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THE
CRIMINAL LAW
REVIEW

January 1959

Editorial Board

With this issue *Criminal Law Review* commences its sixth year of publication. Throughout our first five years we have endeavoured to provide a field for informed discussion of all matters relating to the Criminal Law. We have also endeavoured to provide accurate and readable reports of the sources of that law in our features Case and Comment and Acts and Orders. As we stated in January, 1954, we have aimed to include amongst our readers both branches of the legal profession, the judges and officers of the various courts of criminal jurisdiction and all those, including police officers, who are concerned with the administration of criminal justice. This we have achieved.

In recent years there have been noticed several important trends in our field. First the criminal statistics have shown a disturbing increase in the amount of crime; and secondly, as a result, a very much greater interest has been shown in the methods of dealing with criminals. Parliamentary activity, particularly, has very much increased in the latter field. Thirdly, much greater interest has been shown in the problems of reforming the law. In order to keep fully abreast of these developments, we have sought the assistance and advice of several specialists and have invited them to become members of our Editorial Board. The members of the Board will be: Mr. D. W. Elliott, Dr. J. B. Firth, Professor J. C. Smith, and Mr. Christopher Williams.

In addition we shall have the services as Correspondent in Criminology, of Dr. T. E. James.

D. W. Elliott, LL.B., is a solicitor and Lecturer in Law at the University of Manchester and has written on the criminal law in this *Review*, the *Law Quarterly Review* and others. He currently conducts a course in criminal law for the police.

J. B. Firth, C.B.E., D.SC., F.R.I.C., was formerly Director of the

North Western Forensic Science Laboratory at Preston. He is an expert in the investigation of arson, has written articles for this *Review* and has acted as our Correspondent in Forensic Science since January, 1958.

Professor J. C. Smith, M.A., LL.B., is a barrister-at-law and Head of the Department of Law at the University of Nottingham. A contributor to this and other law reviews, he has written the Commentary in our feature Case and Comment for more than two years.

Christopher Williams is a barrister-at-law and Chief Constable of the Isle of Ely and Huntingdon. Entering the Metropolitan Police he passed through Hendon Police College. After the war he was a member of the directing staff of the Police College at Ryton-on-Dunsmore and Commandant of No. 2 District Police Training Centre before becoming Chief Constable for the Isle of Ely and Huntingdon.

T. E. James, M.A., B.C.L., PH.D.(Lond.), is a Reader in Law at King's College, London. On the Board of Governors of an approved school, he was a co-opted member of the L. C. C., advising on the operation of the Children Act, 1948.

We should like to make it clear that unless otherwise stated the views expressed by the Editors in the editorial pages are expressed independently of any views held by members of the Editorial Board. Where these pages include contributions from any member of the Editorial Board they will be initialled accordingly, and it is not to be assumed that the Editors accord with the views expressed by members of the Board.

Programme for 1959

The scope of the *Review* will continue to be as it has been in previous years. Of our plans for the year, we can reveal the following.

Dr. Glanville Williams, who has written so many stimulating and learned articles for this *Review* since its inception, has promised us a series of four articles on law reform relating to the expedition of criminal trials, the perpetuation of testimony, identification parades and advance notice of the defence. Other legal articles will include "The Onus of Proof in Murder and Manslaughter" by G. H. L. Fridman and "Recent Developments in Criminal Law in Australia" by Professor Norval Morris.

In the forensic science field there will be further articles by Dr. Wilson Harrison, whose name is already well known to readers, and who has recently published his authoritative work *Suspect*

Documents, and an article on Forensic Ballistics by Chief Inspector Hamilton Bantock of the City of Birmingham Constabulary.

Among articles of general interest it is hoped to continue to report from time to time proceedings from Mr. Sutterthwick's court.

This issue, besides an article by Mr. Rupert Cross on the controversial case of *Hill* v. *Baxter*, contains the first of a series of articles by Christopher Williams on the duties and difficulties of a *Prosecuting Officer*, which will examine from a practical point of view the position of police officers who find themselves acting as prosecuting officers in magistrates' courts. We also include the first of three articles by Mr. R. D. Margrave-Jones, LL.M., on the taking into consideration of other offences. This first article considers the history of the practice, the second will deal with the present practice and the third will contain notes on the appropriate sentence to be given in such cases.

The Tucker Report

The Home Secretary has said that he is studying the Report of the Tucker Committee on Proceedings before Examining Magistrates. The Government has not yet reached a decision on the recommendations, but he does not think that, if it were decided to implement them, it would be possible on present propects to find time for legislation this Session (H.C. Debates, Vol. 595, col. 72, November 13).

Sentence wrongly recorded by court

In *R.* v. *Clay* (Court of Criminal Appeal: Lord Parker C.J., Cassels and Diplock JJ.; November 3, 1958) the appellant had been sentenced at assizes to eighteen months' imprisonment for burglary and three months' imprisonment (concurrent) for demanding money with menaces. Lord Parker C.J., giving the judgment of the court, said that the trial judge had drawn the attention of the court to the fact that those sentences had been wrongly recorded; what had been intended was to sentence C. to three months' for the burglary and to eighteen months' for the demanding with menaces. Accordingly, the sentence was varied by making the sentence of three months' apply to the burglary and the eighteen months' to the demanding with menaces.

R. v. Mackinnon and Others

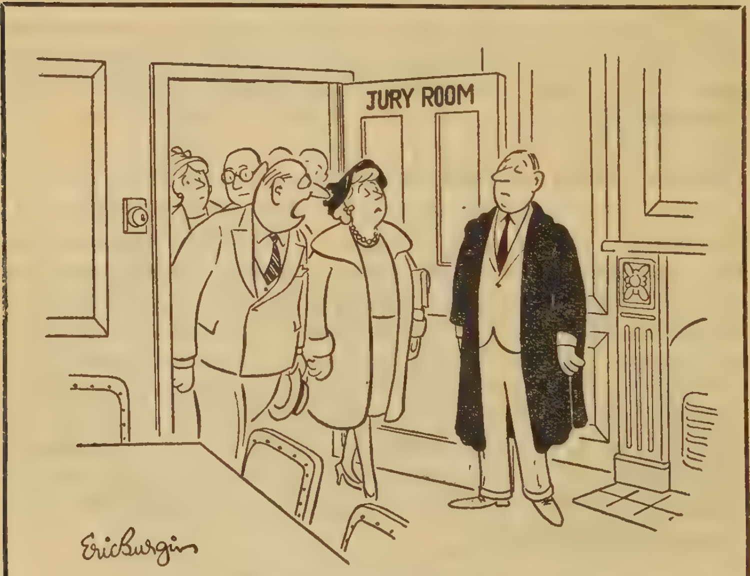
We regret that, in the report of the case of *R.* v. *Mackinnon and Others* at [1958] Crim.L.R. 809, the words " But that on the facts . . . making of statements" in the penultimate paragraph on page 810 should have appeared on page 811 following the words "and that he would direct the jury to that effect."

Fortune telling

In our feature "Summary Justice" for December, 1958, we published, at page 803, a report of the case of Elizabeth Pearl Price. We are now informed that the charge on which Price was convicted was brought under section 4 of the Vagrancy Act, 1824, and not, as stated, under section 1 of the Fraudulent Medicines Act, 1951. A charge of demanding money with menaces, contrary to section 30 of the Larceny Act, 1916, was not proceeded with.

The Wolfenden Report in Parliament

For a summary of the debate in the House of Commons on the Wolfenden Report and of the terms of the Street Offences Bill, see page 38, *post*.



"But if you've never seen a guilty physiognomist before, how on earth can you say 'I know a guilty physiognomist when I see one'?"

Prosecuting Officer

By Christopher Williams

Introductory Remarks

" Right. Now, is there anything else bothering you, Newman? " asked the Superintendent. From his capacious chair he looked across the desk to the Inspector. Sound type, he thought; plenty to learn, though. Still, he's not afraid to ask; and now's the time, before the chromium on his new uniform gets dull. " I mean," he went on, " we've covered a lot of ground, but there are probably one or two things—what about court work, for instance? "

" Now, there's a thing, sir," replied Inspector Newman. " I must confess that bothers me a little. You see, we never really did anything about that at the College—plenty about evidence, and so on, but not what you've actually got to do in court."

" Oh? I thought the new syllabus—— " began the Superintendent.

" Yes," replied Newman, " but that doesn't come into force until this present course. On my course, we all asked for it, but they told us that officially the police weren't supposed to do any more than call out the names of witnesses—that sort of thing. Apparently some committee or other said that police shouldn't act as prosecutors, and so the official view was that we didn't need to learn anything about it."

" Well," replied the Superintendent, " that was the old idea—in spite of the fact that the majority of criminal prosecutions are in fact conducted by police officers. Talk about burying their heads in the sand——. But let's get this straight for a start. In non-indictable cases, and that covers nearly all the cases you'll be dealing with, the law makes it as plain as a pikestaff that the informant—which is you, as the Inspector—is at liberty to conduct the prosecution, and that means just what it says. It used to be in the old Summary Jurisdiction Act of 1848, but that's mostly repealed by the Magistrates' Courts Act of 1952. Here—you can read it for yourself." And the Superintendent flipped open a thick blue book and pushed it, open at the relevant page, across the desk towards Newman.

" I see," said Newman, " ' A party to any proceedings before a magistrates' court may be represented by counsel or solicitor '—*may* *be*, but doesn't have to be, I suppose. But there's nothing in this section 99 about examining witnesses, or cross-examining them, or anything. What about that? "

" I think there's a footnote somewhere there," replied the Superintendent, " about an old case—*Duncan* v. *Toms*,[1] I think. Got it? "

" Ah, yes," replied Newman, " here it is. ' The informant, who is the real prosecutor, is entitled to conduct the case in person, and to examine and cross-examine the witnesses—— ' "

" Yes, that's the one," answered the Superintendent. " Of course, that was decided under the old Act of 1848, which said something about the informant being entitled to employ a solicitor or barrister to examine and cross-examine—merely entitled, mind you—he didn't have to. The new Act doesn't actually say anything about that, but I suppose it had passed into the common law after the *Duncan* v. *Toms* case. That case was one in which an Inspector of the N.S.P.C.C. laid an information for cruelty. The defence objected to the Inspector conducting the case—I believe he tried to cross-examine one of the defence witnesses. Anyway, the magistrates upheld the objection, and the Inspector appealed. On the appeal, they held that the magistrates were wrong, and that the Inspector had the right to examine and so on. Look up the report and you will find what Lord Coleridge C.J. said. It was very much to the point."

" Sounds all right, sir," replied the Inspector. " All the same, I'm sure I've read somewhere that in spite of all that, it's wrong for police to act as though they were solicitors. Now I come to think of it, it was by a solicitor—clerk to some justices somewhere."

The Superintendent chuckled. " I expect it was, young man. Naturally, they don't want to see unqualified men doing work that they're qualified to do—not, of course, that the fees enter into it. It's just a question, I expect, of professional dignity or something. In fact, I wouldn't be surprised if there wasn't something disapproving about it in that book you've got—the editor is a solicitor. Here, give it to me."

He reached for the book. " Yes—' see title *Solicitor*, *post* '—that'll be it." He picked up a companion book, and turned the pages rapidly.

" Ah, here we are," he went on. " Listen—' In summary cases the complainant or informant is at liberty to conduct his case in accordance with the Magistrates' Courts Rules, 1952—— If, therefore, a police constable is the informant on a summary trial, he has the right to address the court and examine the witnesses like any other informer; but the strong expression of the Queen's Bench Division against the practice should be regarded.' "

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[1] (1887) 51 J.P. 631; 56 L.T. 719.

"Well, that's pretty clear," said Newman. "But what's that bit about strong expression?"

"I shouldn't take too much notice about that, you know," answered the Superintendent. "That was a case which turned upon its own special facts, and hasn't got the general bearing that people like to give it when they're trying to discourage police from conducting cases in court. If I remember, there the police informant tried to prevent a police witness from answering questions about the place from which he had observed the happenings which were the subject of the charge.[2] That's quite a different kettle of fish from the ordinary case of conducting a prosecution—different point of law altogether."

"That's perfectly clear to me now, sir. I can examine my own witnesses, and cross-examine the defence witnesses. But what about opening the case? Can I do that?" asked the Inspector.

"Of course you can," replied the Superintendent. "For one thing, it's the duty of everyone in court to help the court to arrive at a correct decision, and if a short summary of the evidence you are calling, and a word or two on the offence itself, will help the court, then it's your duty to supply them. But quite apart from that, you know, the Rules say you can. Look it up—Rule 17, I think."

The Inspector buried his nose in the book again. "Yes—'On the summary trial of an information, where the accused does not plead guilty, the prosecutor shall call the evidence for the prosecution, and before doing so may address the court'—that's Rule 17 (1)."

"There you are, then," said the Superintendent. "All perfectly clear. You are the informant, so you can address the court, call your witnesses, examine them, and then cross-examine the defence witnesses. What I said at the beginning. Nothing clearer."

"Then what's all the fuss about?" asked Newman. "I mean, I could understand it if the law was obscure or ambiguous—of course they would feel entitled to criticise police advocacy——"

"Ah!" interrupted the Superintendent. "That's the real point. Police officers conducting prosecutions is one thing, but police officers trying to be advocates is quite another. If we had always kept ourselves to what the law allows us to do, all this bleat would never have been heard. But it's chaps who get up in court and fling their weight around, mouthing half-digested legal phrases, carrying on as though they were silks; they're the people that have caused all this—and chaps who go about their business as though the only thing they're after is a conviction. You take a tip from me, young man—you do your work as though the result was a matter of indifference to you, and all you cared about was putting the facts before the court, and you'll find you're half-way home and dry before the court opens. No dramatics, whatever you do, and no vindictiveness. And no flannel—they won't stand for that. And no nonsense about making a name for yourself as a legal genius—you'd make a name for yourself, but it wouldn't be that."

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[2] *Webb* v. *Catchlove* (1886) 3 T.L.R. 159.

"Right, sir," said Newman. "I've got all that. But supposing I've done all that, and then I find the defence solicitor making a speech to the court, and I know he's pulling a fast one in some way—do I get a chance of getting back at him later?"

"Well, now," replied the Superintendent, "that's a bit complicated. They call that 'the order of speeches' or something; anyway, there are a few rules to be careful of there. Wants watching. I think we'd best leave all that for another time—wait till we've got time for another little chat." The Superintendent folded his hands, and gazed blandly across at the Inspector.

("Wait till you've had time to look it up, you mean," thought Newman, disrespectfully.) "Quite, sir," he replied.

"Mind you," went on the Superintendent, "it's not a bad rule to assume that you won't have any chance to say anything to the court once your witnesses start. Makes you concentrate on putting your points clearly and concisely. Treat every shot as the last one in your locker."

"Yes, I see that, sir," replied Newman, "but what about things cropping up that you couldn't possibly have foreseen—suppose, for instance, that the defence solicitor asks one of my witnesses something that I don't think he should answer—can I do anything about that?"

"But of course you can," answered the Superintendent. "You can object. But you've got to do it pretty quickly. And you've got to be on pretty strong ground. You see, normally the clerk is quite ready to intervene, and warn the witness that he shouldn't answer, or tell the solicitor that he shouldn't ask the question, and then whisper an explanation to the bench. So you don't want to step in when they'll do it for you, you'd only be crossing swords with the solicitor for no advantage. I mean, you've got to weigh things up. What I used to do was to start hauling myself to my feet, watching the clerk all the time, and if he didn't seem likely to intervene, I would say 'Your Worships!' while I was still getting up. In nine cases out of ten, the clerk would take the hint;

if he didn't, the proceedings would have been brought to a halt anyway, and I had a second or two to put my objection in words. And that's another thing—don't be too dogmatic." He paused, looking at Newman, then went on, " Nothing personal of course, but always be careful not to *know* anything—the court likes it better if you *suggest*, or *believe*, or are given to *understand*, even if you've got it in black and white in front of you. Nothing's more irritating than to have some cocky youngster teaching you to suck eggs."

Newman reddened slightly. " I see, sir," he said. " So I can object to wrongly put questions, so long as I do it quickly but gently. I suppose, too, I can object to improper evidence being given by one of the defence witnesses? "

" Of course," replied the Superintendent, " but remember it cuts both ways. You've got to be ready for the defence solicitor to object to some of your witness's evidence, or your cross-examination of one of his witnesses. So you've got to know your law, and be ready to answer straight off the cuff. Still, if you prepare your work thoroughly beforehand you shouldn't have any trouble about your own witnesses. Know your law—that's the thing."

" Trouble is, sir," answered Newman, " four years in the housing department doesn't help you to keep your law up to date; fact is, I'm a bit rusty."

" Nonsense, boy, there's nothing in it; you'll soon polish that up. The way I look at it, there're four parts to all this. First of all, people make a muddle of it because they don't really understand what evidence itself means—burden of proof, presumptions, and so on. Once you've got that clear in your mind, the next thing is—who can give evidence? That covers all about competence, compellability, privilege, dying depositions, and so on. Thirdly, there's the question of what evidence those persons can give. You know, hearsay, opinions, relevance, admissibility, previous convictions and all that. Finally, having understood what evidence is about, who can give it, and how much they can give, you're left with the last bit—how do you deal with it in court—that covers procedure, which we've touched on today, order of speeches, objections, addressing the court, as well as tricks of the trade like how to say things and when to keep your trap shut. Once you've got those four bits buttoned up, you've nothing to worry about."

" I hope so, sir," replied Newman. " If you'll excuse me now, I have to get back to my station. But before I go, there's just one thing that occurs to me. You've made the whole business very clear, addressing the court, examining witnesses, cross-examining, objections, and so on; I'm sure it'll all be very useful to me—when

I get the chance to use it. But surely nowadays most cases are dealt with under the new Act,[3] and there's no room for what we've been talking about. Is there anything special about the new procedure? "

" Well, of course you're quite right," replied the Superintendent. " The new procedure doesn't give you any scope to do anything—even make mistakes. I shouldn't worry my head about that now if I were you. You just deal with the cases I send along."

" One last thing, sir," said Newman. " What you've said this afternoon has been about summary cases, hasn't it? Well, what about indictable cases? And what about indictable offences triable summarily? That's a thing that's always baffled me."

" That, my young friend," replied the Superintendent, rising to his feet ponderously and with an air of finality, " we can talk about on another occasion."

[*To be continued.*]

Crime and Crown Privilege

During the course of a murder trial at the Nottingham Autumn Assize Stable J. was told that the Army Council had provided the defence with copies of medical reports about the prisoner on condition that they were not produced in evidence. " This," the judge is reported as having said, " is absolute nonsense " and he offered to issue a subpoena to " anybody you like . . . the whole Army Council if you like." Defending counsel asked, and the judge agreed, that a subpoena should be issued to the Under-Secretary of State for War, but on the following day the court was told that the defence had been given permission by the Army Council to put the documents in evidence. On the third day of the trial counsel for the Crown explained that the copies which had been supplied to the defence were photographic copies and that, in supplying them, the War Office had made it clear that the originals would be produced on subpoena without objection: in other words, the objection to the production of the copies was based purely on the fact that they were not original documents and no question ever arose of evidence being withheld from the court.[1]

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[3] Magistrates' Courts Act, 1957.

[1] *R.* v. *Colville*, *Manchester Guardian*, November 18, 19 and 20, 1958.

This result will have come as no surprise to those who are sufficiently well acquainted with the ordinary course of public administration to know that no claim of privilege is nowadays made in criminal proceedings. The incident was plainly due to a fairly simple misunderstanding and is of no intrinsic importance. There is, however, some reason to suppose that the proceedings on the first two days were regarded by some as yet another instance of the Crown's supposed predilection for withholding otherwise admissible evidence in judicial proceedings and it may therefore have a wider significance. Indeed, the remarks which the judge is reported to have made are in themselves sufficient justification for an exposition of the law and practice relating to the privilege of the Crown in this field; and it will be seen that, although the privilege is never claimed in criminal proceedings, the right to claim it in civil proceedings is of vital importance to the proper administration of the criminal law.

Civil proceedings

The basic principles of the law relating to Crown Privilege are to be found in the opinion delivered by Viscount Simon in *Duncan* v. *Cammell Laird* in 1942.[2] Attempts have been made since then by frustrated litigants to persuade the courts to restrict the application of the principles[3]; and on one, slightly astonishing, occasion there was an attempt by the Crown to extend their application.[4] The decision of the House of Lords remains, however, unimpaired: a court is bound to uphold an objection taken to the admission of a document in evidence on the ground that its disclosure would be contrary to the public interest if the objection is taken by the appropriate person in the proper form. The appropriate person is the Minister in charge of the Department concerned (or its permanent head where he is not available or the Department has no Minister in charge of it). The proper form is a claim that it would be contrary to the public interest to produce the document, on the ground either that the particular document contains material the disclosure of which would be injurious to the State or that, irrespective of its contents, it belongs to a class of documents which it is necessary for the proper functioning of the public service to withhold from production.[5]

In the course of his opinion in the case of *Duncan* v. *Cammell*

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[2] [1942] A.C. 624.

[3] The most recent being in *Auten* v. *Rayner* [1958] 1 W.L.R. 1300.

[4] *Broome* v. *Broome* [1955] P. 190.

[5] *A fortiori*, oral evidence of the contents of the document must also be excluded [1942] A.C. 624, at 643.

Laird, Lord Simon said that the law of Scotland was the same as the law of England. The House of Lords has, however, recently held that this proposition was unsupported by authority and that the Scottish courts, unlike the English courts, have an inherent right to order the production of a document notwithstanding an objection taken in proper form by the Minister in charge of the Department concerned. The difference, however, may well be one of principle rather than practice, for it is the law of Scotland that the power shall be exercised only in the most exceptional circumstances and it has in fact been exercised only twice in the last hundred years.[6]

Criminal proceedings

The decision of the House of Lords in *Duncan* v. *Cammell Laird* was confined to civil proceedings, Lord Simon saying that " the practice, as applied in criminal trials where an individual's life or liberty may be at stake, is not necessarily the same." [7] The practice, as has already been said, is now clear enough, but the law relating to the exclusion of evidence in criminal proceedings on the ground that its admission would be contrary to the public interest is not. For certain purposes the courts have drawn a distinction between public and private prosecutions, an objection on behalf of the Crown (although not conclusive) being for those purposes permissible in public, but not in private, prosecutions. The distinction was drawn before the office of the Director of Public Prosecutions was created by the Prosecution of Offences Act, 1879, and it appears that until that time " public " prosecutions comprised only trials for treason and informations in the name of the Crown. Thus, evidence of the name of an informer was excluded in *R.* v. *Hardy*,[8] a trial for treason in which Eyre C.J. said that " there is a rule, which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed." Again, in *Att.-Gen.* v. *Briant*,[9] an action for penalties under the Excise Acts, the court refused to allow a witness for the Crown to answer the question whether he gave the information which led to the institution of proceedings. On the other hand, in *R.* v. *Richardson*,[10] a trial for murder by poisoning in 1863, Cockburn C.J. ordered a police officer to disclose the names of the persons who had given him the information which led to the discovery of a phial containing the poison.

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[6] *Glasgow Corporation* v. *Central Land Board*, 1956 S.L.T. 41.
[7] [1942] A.C. 624, at 633–634.
[8] 24 St.Tr. 199, at 808.
[9] (1846) 15 M. & W. 169.
[10] (1863) 3 F. & F. 692.

The decision in *Att.-Gen.* v. *Briant* was applied, after the office of Director of Public Prosecutions had been created, in *Marks* v. *Beyfus*.[11] In that case, which was an action for malicious prosecution, the plaintiff sought to extract from the Director of Public Prosecutions the names of his informants. The Director objected to answering the question and his objection was upheld by the trial judge, a Divisional Court of the Queen's Bench Division and the Court of Appeal, Lord Esher M.R. saying that "this rule of public policy is not a matter of discretion; it is a rule of law, and as such should be applied by the judge at the trial, who should not treat it as a matter of discretion whether he should tell the witness to answer or not." [12] Those remarks, it will be noticed, occur in a judgment in civil proceedings; in criminal proceedings it appears that the matter is one for the discretion of the judge: thus, the passage which has already been cited from the remarks of Eyre C.J. in *R.* v. *Hardy* continued "if it can be made to appear that really and truly it is necessary to the investigation of the truth of the case that the name of the person should be disclosed, I should be very unwilling to stop it." [13] The case is, however, important as indicating that proceedings instituted by the Director of Public Prosecutions were regarded as public prosecutions for the purposes of the old distinction and presumably the names of informers would have been withheld in such proceedings.

Finally, before the principles underlying these rules of law are considered, two cases in the Central Criminal Court should be mentioned. In *R.* v. *Benson* [14] it was held that an Assistant Director of Public Prosecutions could not be compelled to produce a letter which he had written to the Director; and in *R.* v. *Carpenter* [15] it was held that a conversation between a private solicitor and the Director of Public Prosecutions was privileged.

In criminal proceedings the judge has, it would seem, a discretion which he does not enjoy in civil proceedings and the law is therefore different. The decisions in the criminal cases which have just been cited are, however, of importance in relation to civil proceedings in that they indicate the basis on which the claim for privilege is made in respect of documents in the second of

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[11] (1890) 25 Q.B.D. 494.
[12] (1890) 25 Q.B.D. 494, at 498.
[13] 24 St.Tr. 199, at 808.
[14] (1909) 151 C.C.C. Sess.Pap. 705.
[15] (1911) 156 C.C.C. Sess.Pap. 298.

Lord Simon's categories, *viz.*, documents which belong to a class which it is in the public interest to withhold from production. "The principle" to use the words of Buller J. in *R.* v. *Hardy*, in relation to facts given to the police by an informer, "is that the discovery [*i.e.*, the giving of information] is necessary for the purpose of obtaining public justice; and if you call for the name of the informer in such cases, no man will make a discovery."[16] In short, if essential information will be given only in confidence, the confidence of the informant must be respected. This means, of course, that evidence that would amount to a breach of confidence must be withheld in all cases, whether or not the Crown is a party to the proceedings and, where the Crown is a party, whether or not its exclusion is to the advantage of the Crown. Crown Privilege is, therefore, a rather unhappy misnomer, for the rule is in truth one of the admissibility of evidence rather than of the privilege of witnesses and no question of waiver can, or should, ever arise.

There are a number of important consequences of this distinction. In the first place, the claim of privilege cannot be rejected (as can, for example, a claim based on professional privilege) on the ground that the document came into existence in pursuance of some criminal or fraudulent purpose.[17] In the second place, in the case of documents falling within the second of Lord Simon's categories, the contents of the document itself are wholly immaterial: as has been said, the principle underlying the privilege in such cases is respect for the confidence of the person completing the document and it is disclosure of the document rather than disclosure of its contents which tends to destroy his confidence.[18] In the third place, the decision which the Minister taking the objection has to make is a ministerial decision: that is to say, his duty is merely to decide whether it is essential in the interests of public administration that the particular document (in the first category) or the class of document (in the second) should be protected; it is not his function to determine an issue between the interests of public administration on the one hand and the interests of justice on the other and, as his function is ministerial, it is appropriate that he should be answerable to Parliament rather than to the courts for his exercise of it.[19]

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[16] 24 St.Tr. 199, at 818.

[17] As to which, see *O'Rourke* v. *Darbishire* [1920] A.C. 581 and *R.* v. *Cox and Railton* (1885) 14 Q.B.D. 153.

[18] A point which seems to have been overlooked in *Ellis* v. *Home Office* [1953] 2 Q.B. 135.

[19] Also overlooked in *Ellis*. See particularly the judgment of Morris L.J. at 146–147.

Current practice

The current practice with regard to Crown Privilege is also reasonably clear, the Lord Chancellor having made a comprehensive statement in 1956 in which he indicated with as much particularity as would seem to be reasonably possible the classes of documents in respect of which Ministers would take objection to their production in civil proceedings.[20] With the exception of a small class of documents to which it is unnecessary to refer in detail in the present context,[21] that statement remains as an authoritative exposition of current ministerial practice. The Lord Chancellor stated unequivocally that Crown Privilege would not be claimed in criminal proceedings [22] and any questions relating to the law of privilege in criminal proceedings are, therefore, at any rate at present, wholly academic. It is accordingly possible to turn at once to the classes of documents which are withheld from production in civil proceedings in order to ensure the proper administration of the criminal law.

An obvious clue is provided by the decisions in criminal cases quoted above: it is essential for the proper detection of crime that the names of police informers, and such documents as police reports, should be kept secret. In view of the severe criticism made by the courts in recent years of almost every reported claim for Crown Privilege, it is significant that the most vigorous defence of it should have been made in this very context by a member of the judiciary. In the Hamlyn lectures for 1957, Lord MacDermott, after expounding the decision of the House of Lords in *Duncan* v. *Cammell Laird* and referring to the two categories specified by Lord Simon, continued:

> " Now it is quite plain that the public interest can be very seriously prejudiced by the publication of documents in either of these categories. In the first, the nature of the danger will usually be direct and obvious to the informed. In the second, the danger may be less obvious and more remote but just as real, nevertheless, for those who have the responsibility of seeing that the public service remains efficient and on a sound footing. Suppose, for example, that in the course of cross-examination a police officer is asked to state, or to produce some document showing, the source of the information which led him, in the course of his duty, to keep a watch

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[20] 197 H.L. Deb. 741.
[21] 562 H.C. Deb. 1596–1606.
[22] 197 H.L. Deb. 745.

> on certain premises. If there was need to think beyond the instant case compliance with such a request might be quite innocuous, but in that sort of situation the responsible authority cannot properly take so narrow a view. If the officer were bound to answer that sort of question or to produce that sort of document, the ultimate and undoubted effect would be to discourage informants and to make the protection of the public very much more difficult than it is."[23]

In criminal proceedings, of course, the name of the informant whom it is not proposed to call as a witness will rarely be relevant: in the rare cases where it is relevant and his identity cannot be disclosed the only course open to the Crown, now that claims for privilege are not made in such proceedings, is to abandon all hope of prosecuting. The need to protect his identity in civil proceedings, however, remains. It is unfortunate that the Lord Chancellor's statement on this point should appear a little ambiguous. He said:

> "Statements made by witnesses to the police are produced in court on subpoena in civil cases and may be furnished earlier with the consent or at the request of the witnesses themselves. The only exception, made for obvious reasons, is for statements by "informers," *i.e.*, persons volunteering information about the commission of crimes."[24]

The use of the inverted commas might be thought to suggest that the Lord Chancellor was drawing a distinction between professional informers and casual informants. It is scarcely credible that the Home Secretary, who is the responsible Minister in matters relating to the police, would refuse to protect the name of an ordinary informant and it is therefore reassuring that, in the recent case of *Auten* v. *Rayner*,[25] the Court of Appeal clearly indicated that it would be proper to protect an informant's name. In that case privilege had been claimed, on the class basis, for police reports and similar documents and, on what may be called the contents basis, for some entries in a police officer's diary which revealed the names of his informants. The claim for privilege on the class basis had been challenged by the plaintiff on two grounds: first, that the Home Secretary, by virtue of the fact that he was a relative by marriage of one of the defendants, was disqualified by bias from asserting the privilege; and second, that as there was a prima facie case of fraud against the defendants, the privilege had been displaced. The Court of Appeal held that the Home Secretary's relationship to the defendant was too remote to sustain any suggestion of bias, and held that, as the Minister in charge of the responsible Department, he was accordingly the proper person to make the claim for privilege; the second ground of appeal was also rejected, the court holding (without deciding whether or not a prima facie case of fraud had been established) that fraud is not a ground on which Crown Privilege can be displaced. No order was made on the appeal so far as it related to the documents containing the names of police informants but the Master of the Rolls is reported as having said during the course of the argument that "I should have thought that in the interests of good order and society it is rather important that, if people give information in confidence, that confidence should be respected." [26]

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[23] *Protection from Power under English Law*, pp. 103–104.
[24] 197 H.L. Deb. 745.
[25] [1958] 1 W.L.R. 1300.

Reasons behind the rule

It is frequently said by critics of the present law of Crown Privilege, and the judgment of the Court of Appeal in *Auten* v. *Rayner* may be thought to bear them out, that it would be sufficient to allow the judge to decide whether or not to admit in evidence the document which the Crown wishes to withhold.[27] The contention is plausible enough in the context of such cases as *Auten* v. *Rayner* and *Iwi* v. *Montesole*,[28] where the aspect of the public service in question is so closely related to the administration of justice as to be readily appreciated by the lawyer. It is very much less plausible where the document in issue is (to take two examples which occur fairly often) the minute of a civil servant to his Minister or the confidential report of one Army officer on another; and further reflection shows that it is unconvincing even where it is superficially plausible. The judge considering the admissibility of a document will inevitably consider its contents; if, like one of the documents in issue in *Ellis* v. *Home Office*, it contains nothing whose disclosure will embarrass anyone, he will, inevitably, tend to order its production; and the damage will be done.[29] No one completing a document of that class will ever again be sure that his confidence will be respected and documents of that class will be less candidly expressed than they were before.

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[26] *The Times*, October 24, 1958.

[27] See particularly an article by Mr. J. E. S Simon, Q.C., M.P., in the *Cambridge Law Journal* for April, 1955, and the debate in the House of Commons, on a motion proposed by Mr. Simon, on October 26, 1956: 558 H.C. Deb. 946–1038.

[28] March 7–14, 1955 (unreported).

[29] See *Ellis* v. *Home Office* [1953] 2 Q.B. 135.

The judge, in short, will have answered the wrong question. The right question—and it is an administrative, not a judicial, question—is whether it is essential that documents of that class should be candidly expressed; and to the determination of that question the contents of any one document in the class are—obviously—wholly irrelevant. Some litigants will be prejudiced whatever method is adopted of determining what evidence must be excluded in the public interest. This result is accepted willingly enough in respect of evidence of what may loosely be called State secrets; but where the Crown seeks to withhold documents on the "class" basis other criteria must be applied. There are good grounds for rejecting the argument that in such cases the court should have power to decide whether the Crown's claim must be sustained; the proper safeguard of the interests of the litigant, it is suggested, is the rigid application of a fair and clear rule: much of the misgiving caused by the decision in *Duncan* v. *Cammell Laird* would be removed if the ordinary litigant knew at the outset what documents would be withheld from him and appreciated the grounds on which they would be withheld. Unhappily, that is not always the case today; but, despite the arguments of counsel for the plaintiff in *Auten* v. *Rayner*, it can confidently be assumed that the civil courts will never hesitate to shield from publication the reports of police officers engaged on investigations into crime and the names of those from whom they have obtained information in confidence.

Taking Other Offences into Consideration—The History of the Convention

By R. D. MARGRAVE-JONES, LL.B.

> "Everyone knows now—at least, I hope they do—what is the effect of taking offences into account. It is a convention; it is not statutory. I have often thought it would be a good thing if the matter had been dealt with by statute in the Criminal Justice Act, 1948, but it was not." [1]

Certainly it is the common prosecution practice to inform a court of other similar offences which are outstanding against a convicted criminal, if the latter definitely admits the truth of those charges, so that the court may take them into consideration when imposing sentence for the crime for which the accused stands convicted. It is interesting to observe, however, that a practice of such far-reaching effect should still lack any statutory authority.

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[1] *Per* Lord Goddard C.J. in *Batchelor* (1952) 96 S.J. 346.

Origin of this convention

When once penologists had accepted the reformation of the criminal as an essential element in any rational system of punishment, it became apparent that to allow one who had committed a series of crimes to be continually re-arrested for similar offences, which could have been disposed of when he was first sentenced, would make his reformation almost impossible.

Until the beginning of this century it was the normal practice to hold pending charges over the prisoner's head until he had completed one sentence and then to try him for similar offences committed before his first term of imprisonment.

Although a prisoner, against whom warrants were outstanding, could be brought up on a Home Office order whilst he was serving his sentence to have the further charges dealt with, this course was not always taken. Instead, the date of the convict's discharge was obtained from the prison authorities, and a police officer met him at the prison gates on his release and arrested him on a warrant in respect of the further charges.

The late nineteenth century, however, was a time of considerable reform of criminal law and procedure; the humane practice of "taking other offences into consideration" was given legal sanction against a background which included pressure for the admission of the evidence of the accused and for the establishment of a Court of Criminal Appeal. The Probation of First Offenders Act, 1887, was a striking instance of the growth of sentiment in favour of a more lenient treatment of prisoners, and there was a general tendency at this time to pass lighter sentences.

Judges now gave more attention to the previous conduct of the offender and by 1890 it was the usual practice for courts to be informed by the police not only of the prisoner's previous convictions but also of his general antecedents.

Differences of judicial opinion

This system of receiving hearsay evidence of a convict's record, though well established, especially at the Old Bailey, was considered to be somewhat irregular and was occasionally challenged by judges, as it involved an informal arraignment of the accused and, to an extent, sentence without trial for offences not strictly before the court.

At the same time, it was the policy of the Home Office to encourage police authorities to inform courts of any warrants relating to similar charges which were out against the prisoner in other jurisdictions, so that the judge might have an opportunity of giving sentence in the light of these pending charges. Although judicial practice was not uniform in such cases, undoubtedly certain judges accepted this police information as further evidence of the prisoner's general antecedents.

As a method of disposing of outstanding warrants, however, this procedure proved to be unsatisfactory. From the point of view of the police and Home Office, it was often difficult to decide when, and to what extent, a particular judge had impliedly taken pending charges into consideration when imposing sentence. Moreover, neither the Home Office nor the judges themselves had the power of preventing execution of warrants which had, in fact, been taken into account in this manner. Where, however, the Home Office considered that the amount of the punishment awarded by the judge had been affected by police information regarding other offences, it was that Department's policy to notify the relevant police authorities of this fact and to advise them to take no further action against the prisoner in respect of the outstanding warrants.

The complete absence of any general procedure in this matter was most keenly felt where the outstanding charges related to offences committed in different jurisdictions. Matters came to a head in *Lee*,[2] a case before Hawkins J. at Kent Assizes on November 27, 1895.

George Lee was sentenced to six months' imprisonment for obtaining money by false pretences at Margate. Twelve or fourteen warrants were pending for similar offences committed in different jurisdictions. The accused asked the trial judge whether he would be arrested on these warrants when he had served his present term of imprisonment.

Hawkins J.: " I cannot say whether they will be executed or not . . ."

Prisoner: " Cannot your Lordship say that I must not be re-arrested? "

Hawkins J.: " No; unfortunately I have not that power. All you can do is to communicate with the Home Secretary and place the matter before him. I have known of a case of this kind where a man after serving a term of imprisonment was re-arrested and compelled to remain in prison three months before he could be tried on the second warrant. These cumulative sentences do not give a prisoner a chance, and this practice will never receive my support. . . . I only wish I had authority to act in such a case as this."

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[2] (1895) 59 J.P. 794.

In his charge to the grand jury at Cambridge Assizes in the following June, Mathew J. mentioned *Lee's* case, emphasising that although the prisoner wished to be cleared of his liabilities in other counties, the trial judge had no power to grant such a request. His Lordship hoped that something would be done to remedy this state of affairs.[3]

On February 28, 1896, Lord Russell C.J. stated that many questions connected with punishment required attention. Among these was the unsolved one of the true principles on which punishment should be awarded for crime. Again, the uniformity and the gradual and cumulative force of sentences in the case of habitual criminals deserved closer and more careful attention.[4]

During the next month a meeting of the Council of Judges of the Supreme Court was held at the House of Lords, pursuant to the Judicature Act, 1873. Both Lord Russell and Hawkins J. attended the conference and thus had an opportunity of discussing this problem. The Council met again on July 1, 1896, to receive the report of a Committee of Judges which had been appointed at the April meeting to consider "several important matters relative to legal procedure." Subsequent events suggest that the practice of taking other offences into consideration came into being as a result of the deliberations of the Supreme Court judges at this meeting. The Home Secretary, to whom this matter had been referred, agreed to encourage the police to take the necessary administrative action and the judges decided that they possessed the power to deal with outstanding warrants pending in different jurisdictions.

The Home Office circular

In the month following the report of the Legal Procedure Committee, the Home Office issued the following circular to police authorities, chief constables and watch committees of boroughs:

"The Secretary of State has recently had under his consideration the case . . . of a prisoner convicted of some offence of dishonesty against whom warrants have been obtained by various police forces on charges of a precisely similar nature committed in other jurisdictions. It appears to the Secretary of State highly undesirable that a prisoner should be repeatedly re-arrested at the prison gates and, as you are probably aware, Her Majesty's judges occasionally express a similar opinion from the bench.

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[3] 101 *Law Times Journal* 163.
[4] 31 *Law Journal* 175.

"The Secretary of State has laid the matter before the Lord Chief Justice and the Council of Judges, and while the difficulty is one which cannot be finally or completely removed without legislation, he considers that it might be materially lightened by administrative action.

"He would urge that whenever a prisoner is to be tried for an offence committed either prior to, or in connection with, another offence of a similar nature for which he has already suffered punishment, the fact may always be brought to the notice of the court by whom, in the event of conviction, judgment will be passed; and further that any remarks which may have been made by the court before whom the earlier case was tried may also be brought, if possible, to the notice of the judge who hears the later case."

It is usually thought that from this circular the origin of the practice of taking other offences into consideration is to be traced, but it must be emphasised that the directive is addressed to police authorities only; it does not, in any way, purport to suggest judicial practice. Moreover, the circular only contemplates cases where the prisoner is faced with charges similar to those "for which he has already suffered punishment" and not where he is on trial for the first time.

An early instance of the implementation of the decision of the Council of Judges occurred at Sussex Assizes in February, 1897.[5]

A woman was convicted of obtaining money by false pretences and the police, acting on Home Office instructions, informed the trial judge of a large number of warrants relating to other charges in different parts of the country which were out against the prisoner. As a result of this information the judge, Cave J., took these other charges "into consideration" when imposing sentence.

In the House of Commons, the Secretary of State, Sir M. W. Ridley, explained that the action of the Home Office in *Manning's* case had been taken in pursuance of a policy which had been recently discussed with Her Majesty's judges, namely, that "in the interests of the prisoner, the various offences of the same kind committed by her might be taken into account at one time and her repeated re-arrest at the prison gates might be avoided."

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[5] *Manning* (1897) 32 L.J. 99.

It is true that the circular of 1896 was sent " in pursuance " of such a policy, but it dealt solely with the suggested police procedure in such cases. The Home Secretary could not direct the judges to take pending charges into consideration.

If the practice were in existence before this decision of Cave J., it was not well known in certain legal circles, for the comment of the *Law Journal*[6] reads: " From a case at the recent Sussex Assizes at Lewes, it would appear that the Home Office has introduced a salutary practice which will restrain the ardour and oppressiveness of the police. It has been a common practice where a man is convicted to hold over other charges against him and re-arrest him after the first sentence has been served, and proceed to a fresh trial.

" The practice hitherto prevailing in some counties has been to play with such a prisoner like a cat with a mouse, and to give him no fair chance of ending his career of crime."

It would appear that there was a lack of general direction in this matter; certainly judicial practice was not uniform. Whereas some judges of assize followed the lead of Cave J. and took into consideration, in passing sentence on a convicted person, other offences of a similar nature alleged to have been committed in different jurisdictions, others were of the opinion that they would not be justified in allowing any unproved charge which might be hanging over a prisoner to affect the sentence to be passed on him for the specific crime for which he had been convicted.

Where there were numerous charges against a prisoner which were alleged to have been committed in the same jurisdiction, however, it was a common practice to try the accused for a large number of similar offences, such as a series of false pretences, in pursuance of a retributive and deterrent policy of criminal law administration. Here again, the nineteenth century brought a change of attitude, and the courts, now bent upon the reformation of the criminal, condemned the drawing up of numerous indictments and long series of counts against the accused.

The settlement of the new rule

In *King*,[7] Hawkins J. was most emphatic: " I think it a scandal that a man should be put to answer forty charges. It may, of course, be legally done, but I think it cannot be done without the prisoner being grievously prejudiced. It has occurred to me more than once that it is a cruel thing to multiply the charges in one indictment. I remember in one case of a bankruptcy prosecution an indictment which contained ninety-nine counts, and was told that there was a case in which the indictment had contained 114 counts. In such a case it would not be unreasonable to ask the court to try each count separately."

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[6] 1897, p. 99.
[7] [1897] 1 Q.B. 214, C.C.R. See the report at 75 L.T. 392.

Per Cave J.: "I entirely concur with what has been said as to the length of the indictment. Six counts would have contained all that was necessary, and I should, if I had tried the case, have been disposed to disallow the costs of the prosecution."

Remarks of this nature from the bench may well have forced the prosecution to seek other methods of ensuring that the whole matter would be before the court. It had already been decided by this time that upon a charge of, say, false pretences, evidence may be given of other obtainings by similar pretences; and there are, no doubt, cases in which this kind of proof may be desirable in order to rebut a defence that the pretences in the transaction forming the subject-matter of the charge have been used for an innocent purpose.[8]

But this method of bringing all the facts before the court is only of limited application. In other cases, the practice of obtaining a conviction on a few charges and having the remainder "taken into consideration" offers a reasonable alternative procedure.

Nevertheless the convention developed very slowly, and no general practice obtained throughout the country. Whereas some police authorities continued to pursue "similar charges" after a convict's release from prison, others carried out the Home Office instructions. No High Court rulings were given until *Syres*[9]; before that time the practice was rarely mentioned on the bench or elsewhere, though there is some evidence of its existence between 1896 and 1908. It is clear that some courts of quarter sessions as well as assize judges now began to employ this new procedure as a convenient means of disposing of numerous charges pending against prisoners. In *Hyslop and Stevenson*,[10] for instance, the Surrey Quarter Sessions when sentencing two prisoners for certain bicycle thefts took into consideration twelve similar thefts for which the men had not been formally tried.

Moreover, after the Summary Jurisdiction Act, 1899, had given magistrates' courts the power to deal, *inter alia*, with cases of obtaining by false pretences, the practice of taking outstanding offences into account was widely used in these courts, though no uniform method of treatment existed.

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[8] See *Makin* v. *Att.-Gen. for New South Wales* [1894] A.C. 57.

[9] (1908) 73 J.P. 13.

[10] (1897) 61 J.P. 377.

The whole position was regularised by the decision of the newly created Court of Criminal Appeal in the leading case of *Syres*.[11]

The appellant had drawn cheques on a closed bank account to obtain goods thereby in different jurisdictions. Whilst serving a six months' sentence for one such fraud, he was brought up before the recorder of Cambridge on another charge of obtaining goods by false pretences.

The police informed the recorder, before sentence, that Syres had committed a number of frauds and gave details in six cases, but did not mention two cases within the jurisdiction of the Kent Quarter Sessions.

In passing a sentence of twelve months' imprisonment with hard labour, the recorder expressed a hope that Syres, after he had served his term, would be able to start life again with "a clean sheet."

Apparently the Kent police authorities either were not informed fully of the circumstances of the case or else chose to ignore the instructions of the Home Office, for they charged Syres with the two other frauds. At the subsequent trial at Maidstone Quarter Sessions the remarks of the Cambridge recorder were not brought to the chairman's attention and the prisoner received a sentence of three years' penal servitude. Thereupon Syres appealed against this sentence.

The Court of Criminal Appeal received a letter from the Cambridge recorder which read: "I particularly told the prisoner I wished him to start afresh at the end of his sentence, and asked for the various charges against him to be brought to my notice in accordance with the Home Office Rules."

Delivering the reserved judgment of the court (Channell, Phillimore and Walton JJ.), Channell J. stated: "We have not found a circular directed to judges, recorders or chairmen of quarter sessions such as occasionally comes from the Home Office directing their attention to questions of sentencing prisoners."

This is consistent with the view, already expressed above, that the practice of taking offences into consideration was the result not of Home Office instructions, but of a judicial convention encouraged, it is true, by Home Office directives to the police authorities. Although Channell J. read but a portion of the circular of 1896, he did not in any part of his judgment treat it as a basis, or as an authority, for the practice of taking other offences into consideration.

His reason for reading out the circular was to approve of the opinion expressed by the Home Secretary therein regarding the undesirability of issuing fresh charges against a prisoner on his release from prison: " Of the judges who expressed the opinion referred to in the circular [*i.e.*, regarding repeated re-arrests] I well remember that the late Lord Justice Mathew was one. A series of such prosecutions deprives a prisoner of the reasonable opportunity of returning at the expiration of his sentence to an honest life."

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[11] (1908) 73 J.P. 13.

After stating the facts and declaring that the Maidstone sentence could not stand, he pointed out that " it was desirable that the whole matter should have been taken into consideration at Cambridge, as far as that was possible."

Channell J.'s judgment suggests that he knew of and accepted the practice of taking other offences into account. Here he was dealing with a novel point, that is, the " consideration " of charges not actually mentioned at the trial.

" Of course we do not lay down any general rule that where a judge has taken into his consideration a number of cases before he has sentenced a prisoner, but has not had his attention directed to certain cases, that those cases cannot be proceeded with later. . . ."

Finally, Channell J. laid down this general principle:

" We think that it follows from our decision that the judge before whom one case against a prisoner comes is entitled to take into consideration other cases which the prisoner admits."

But as to rules of practice and the scope of this procedure, nothing was said.

[*To be continued.*]

Hill v. *Baxter and the Law of Evidence*

By Rupert Cross, D.C.L.
Lecturer in the Law of Evidence in the University of Oxford

The decision of the Divisional Court in *Hill* v. *Baxter*[1] has already provoked discussion concerning the defence of automatism.[2] The judgments also provide food for thought with regard to certain points in the law of evidence. After referring to the *ratio decidendi*, it is proposed to discuss the evidential aspects of the case under the heads of the two burdens of proof, the burden of proving automatism and the effect on the burden of proof of a party's peculiar means of knowledge with regard to one of the facts in issue.

The ratio decidendi

In *Hill* v. *Baxter* the defendant was charged with driving in a manner dangerous to the public and failing to stop at a halt sign. He had driven across a road junction in Brighton without stopping at a halt sign, after which his car had collided with another vehicle and overturned. The defendant said that he was unable to remember anything between leaving Preston Circus and searching for his glasses shortly after the accident. Preston Circus seems to have been about a quarter of an hour's drive from the place of the accident, and the magistrates concluded that the defendant must have driven with skill after leaving the circus. They nevertheless acquitted him on the ground that he had fallen into a state of automatism by the time of the accident. The three members of the Divisional Court were unanimously of opinion that the case should be remitted to the magistrates with a direction to convict because, although the magistrates were fully entitled to believe the defendant, there was insufficient evidence to support their view of the facts.

According to Lord Goddard C.J. the onus of proving that he was in a state of automatism was undoubtedly borne by the defendant. When an onus is on the defendant in a criminal case, the burden is not as heavy as it is when borne by the prosecutor. The defendant's onus is discharged if, on the whole of the evidence, it is more probable than not that his contention is correct. He does not have to make his contention good beyond reasonable doubt, but, as Lord Goddard observed, the defendant's evidence in *Hill* v. *Baxter* showed nothing except that after the accident he could not remember what took place after he left Preston Circus. This was quite consistent with his having been overcome by sleep or drowsiness, in which case he would have been guilty of the offences with which he was charged because he should have stopped driving. His subsequent automatism would not have been excusable.

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[1] [1958] 1 Q.B. 277.

[2] Prevezer, "Automatism and Involuntary Conduct" [1958] Crim.L.R. 361, 440; Edwards, "Automatism and Criminal Responsibility" (1958) 21 M.L.R. 375.

Devlin and Pearson JJ. reserved for future consideration the question of where the burden of proving automatism ultimately lies. Devlin J. said: "There is also recognised in the criminal law a lighter burden which the accused discharges by producing some evidence, but which does not relieve the prosecution from having to prove in the end all the facts necessary to establish guilt."[3] This lighter burden was borne by the defendant on the issue of automatism and he had failed to discharge it. The inference that he was excusably unconscious at the time of the accident could not reasonably be drawn from the fact that he remembered nothing after leaving Preston Circus since when he had been conscious because he had driven with skill. The case stated did not contain "evidence of automatism of a character fit to leave to a jury."[4]

There is nothing to suggest that Lord Goddard C.J. would have differed from this conclusion, but the *ratio decidendi* to be extracted from his judgment differs from that to be extracted from the judgments of Devlin and Pearson JJ. Lord Goddard rejected the plea of automatism because it was not supported by evidence rendering it more probable than not that the defendant was excusably unconscious at the material time (such evidence being necessary to discharge the burden of proof borne by the defendant). The *ratio* to be extracted from the judgments of Devlin and Pearson JJ. is that the defendant had failed to produce sufficient evidence to raise a reasonable doubt whether he was conscious or excusably unconscious at the time of the accident. Accordingly, the plea of automatism failed even if the prosecutor bore the burden of negativing it once the issue had been effectively raised.

The two burdens of proof

The judgment of Devlin J. is likely to prove of much assistance to students of the law of evidence because it clearly recognises the distinction between the burden of proof and the lighter burden of producing evidence. In this context, the burden of proving an issue is borne by the party who will lose on that issue if, at the end of the case, the tribunal of fact is not satisfied that his contention is correct. The burden of producing evidence is borne by the party who must raise the issue in the first instance. Failure to recollect the distinction between the two burdens has occassionally caused judges to direct juries in terms suggesting that it is incumbent on the accused to satisfy them with regard to the existence of facts supporting a plea of provocation or self-defence, whereas it is only necessary for the accused to adduce sufficient evidence to raise a reasonable doubt whether he was provoked or acting in self-defence.[5] It was a misdirection of this nature on the issue of self-defence which led the Court of Criminal Appeal to quash a conviction for wounding with intent to do grievous bodily harm in *R.* v. *Lobell.*[6] When delivering the judgment of the court Lord Goddard C.J. said: "It is perhaps a fine distinction to say that, before a jury can find a particular issue in favour of an accused person, he must give some evidence on which it can be found, but nevertheless the onus remains on the prosecution. What it really amounts to is that, if in the result the jury are left in doubt where the truth lies, the verdict should be not guilty."

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[3] [1958] 1 Q.B. at p. 284.
[4] *Ibid.*, at p. 285.

Although it has only been expressly mentioned by English judges comparatively recently, the distinction between the two burdens has often been stressed by legal writers who speak on the one hand of the "persuasive burden," the "legal burden" or the "burden of proof on the pleadings" and, on the other hand, of the "burden of adducing evidence" or the "evidential burden." The validity of the contrast has, however, been challenged by Professor Nokes.[7] He says that, "In the absence of any relevant presumption, the party who bears the burden of proving any fact necessarily has a burden to adduce evidence in support of the fact," and concludes that "The conventional recognition of two burdens is misleading. The phrase 'burden of proof' embodies an abstract conception expressed in metaphorical form. It has only one meaning; that is, an obligation to adduce evidence of a fact."

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[5] In exceptional cases the evidence of provocation or self-defence may be provided by the witnesses for the prosecution. As Lord Watson said in a civil case: "A plaintiff who comes into court with an unfounded action may have to submit to the inconvenience of having his adversary's defence proved by his own witnesses" (*Wakelin* v. *London & South Western Ry.* (1887) 12 App.Cas. 41, at p. 48).

[6] [1957] 1 Q.B. 547. *Chan Kau* v. *R.* [1955] A.C. 206 is a similar decision with regard to provocation.

[7] (1956) 5 I.C.L.Q. 358–361.

Expressions such as the "burden of proof" are, of course, meaningless apart from the context in which they are employed. Professor Nokes seems to have been primarily concerned with the normal situation in which the burden of adducing evidence with regard to a particular fact is borne, in the first instance, by the party who will lose the issue unless he establishes the fact's existence on a preponderance of probability or beyond reasonable doubt, as the case may be. This is the usual position in civil proceedings. The plaintiff must adduce evidence of the facts essential to his case, and the defendant must adduce evidence of facts pleaded in confession and avoidance. In each instance the party first adducing evidence will lose if the quantity of evidence adduced ultimately proves to be insufficient to satisfy the tribunal of fact, although it was sufficient to discharge the burden of adducing evidence at an earlier stage of the trial. This is because the quantity of evidence which constitutes a case to answer on a particular issue will generally be less than the quantity of evidence which will establish one of the parties' contentions on that issue. Similarly, in criminal proceedings, the prosecution generally bears the initial burden of adducing evidence of the facts essential to constitute the crime charged, and the prosecution will fail, notwithstanding the discharge of that burden, if the evidence ultimately proves to be insufficient to establish the existence of those facts beyond reasonable doubt.

In all of the above examples the burden of adducing sufficient evidence to make out a prima facie case on a particular issue and the burden of satisfying the tribunal of fact after all the evidence has been called may plausibly be regarded as the same burden of adducing evidence considered at different stages of the trial. They are so regarded by Professor Nokes, but his definition of the burden of proof in terms of the burden of adducing evidence is liable to produce acute verbal difficulties in those cases in which the burden of adducing evidence is not borne in the first instance by the party who will lose the issue if he fails to satisfy the tribunal of fact to the appropriate degree of conviction. We have seen that on a charge of murder the burden of adducing evidence with regard to provocation and self-defence is borne by the accused. He therefore has the "burden of proof" in Professor Nokes's terminology, but the accused does not have to satisfy the jury that he was provoked or acting in self-defence. Even if the jury do not accept his contentions, they must acquit him if they are left in any reasonable doubt. Ever since the House of Lords gave judgment in *Woolmington* v. *Director of Public Prosecutions*,[8] the customary method of stating the position has been to say that, throughout the trial, the Crown bears the burden of proving that the killing was unprovoked and that the accused was not acting in self-defence, but this language is not permitted by Professor Nokes's terminology because the Crown does not bear the burden of adducing evidence with regard to these matters at the beginning of the trial. It seems, therefore, that what is required is an agreed terminology by means of which it is possible to distinguish between burdens of the kind borne by the Crown and the accused respectively on such issues as provocation and self-defence. It would be difficult to improve upon the distinction between the burden of proof and the lighter burden of producing evidence which is drawn in the judgment of Devlin J. in *Hill* v. *Baxter*. Accordingly, it is to be hoped that these terms will become part of our judicial vocabulary for there are several contexts in which the distinction is important.

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[8] [1935] A.C. 462.

Throughout the rest of this article the two expressions are generally used in the same sense as that in which they were used by Devlin J.

The burden of proving automatism

In *Hill* v. *Baxter* Lord Goddard C.J. gave two reasons for concluding that the burden of proving automatism is borne by the accused. "It is not only akin to a defence of insanity, but it is a rule of the law of evidence that the onus of proving a fact which must be exclusively within the knowledge of a party lies on him who asserts it."[9] It will be convenient to examine these reasons separately, as the first was the only one mentioned by Devlin J. After saying that, if the automatism pleaded amounted to insanity in the legal sense, "it is well established that the burden of proof would start with and remain throughout upon the defence," Devlin J. concluded that "as automatism is akin to insanity in law there would be great practical advantage if the burden of proof were the same in both cases. But so far insanity is the only matter of defence in which under the common law the burden of proof has been held to be completely shifted."[10] This is why Devlin J. reserved for future consideration the question where the burden of proving automatism ultimately lies.

The practical advantage of a rule according to which the incidence of the burden of proof is the same in the cases of automatism and insanity may be illustrated by the absurd consequences of a rule to the opposite effect. Let us suppose that D and E are charged with unlawfully wounding P on separate occasions. D's defence is that he did not know what he was doing on account of an illness not amounting to a disease of the mind. E's defence is that he did not know what he was doing owing to a disease of the mind. On the assumption that the burden of negativing a plea of automatism not amounting to insanity is borne by the Crown, D must be acquitted even if the jury think it more probable than not that he did know what he was doing, provided they entertain a reasonable doubt on the subject. On the other hand, E must be convicted even though the jury consider the probabilities to be completely equal on the question whether he knew what he was doing. His defence amounts to an assertion that he did not know the nature and quality of his act within the meaning of the M'Naughten rules, and the burden of proving insanity on a preponderance of probability is borne by the accused.

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[9] [1958] 1 Q.B. at p. 282.
[10] *Ibid.*, at p. 284.

There are two answers to the argument based on absurdity. In the first place, as Devlin J. has suggested extrajudicially, the rule that the burden of proving insanity is borne by the accused derives from the out-moded notion that there is something wrong and blameworthy about becoming insane.[11] Moreover, the rule that the accused who pleads insanity bears the burden of proving his ignorance of the nature and quality of his act is based on an outdated view of the effect of the presumption that everyone intends the natural consequences of his acts. When the M'Naughten rules were formulated, this presumption was a rebuttable presumption of law which cast the burden of negativing it on the party denying its applicability to the facts of his case. It is now settled that the presumption merely casts a burden of producing evidence on the party against whom it operates.[12] Accordingly, it would be unwise to base a new rule concerning the incidence of the burden of proof of automatism when insanity is not pleaded on the existing rule concerning the incidence of the burden of proving automatism when insanity is pleaded. It would be invoking one anomaly to justify the creation of another.

The second answer to the argument based on absurdity depends on the authorities. Both the House of Lords in *Woolmington* v. *The Director of Public Prosecutions*,[13] and the Privy Council in *Chan Kau* v. *R.*,[14] have used language suggesting that the only situation in which the burden of proof is borne by the accused at common law is that in which insanity is pleaded. Something very like automatism was at issue in *Woolmington's* case, for the accused's defence to a charge of murdering his wife was that he involuntarily pressed the trigger of a gun when endeavouring to induce her to return to him by threatening to shoot himself. Woolmington's appeal was allowed by the House of Lords because the trial judge had directed the jury that, once it appeared that the deceased woman was killed by a shot fired from the gun he was handling, it was incumbent on the accused to satisfy them that the shooting was accidental. Lord Sankey L.C. said: " No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained." Lord Sankey recognised that there is an exception to this principle when insanity is pleaded, but it would surely be " whittled down " if the burden of proving automatism were cast upon the accused when there is no plea of insanity.

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[11] [1954] Crim.L.R. 675

[12] *Ibid.*, pp. 679–680.

[13] [1935] A.C. 462.

[14] [1955] A.C. 206.

Pleas of automatism are comparatively rare. As the law on the subject develops, convincing practical reasons for placing the burden of proof on the accused may emerge. Until this occurs, it is perhaps a good thing that the question of the incidence of the burden of proof should not be finally decided. As Lord Goddard C.J. was the only member of the court to decide the question in *Hill* v. *Baxter*, the question can hardly be regarded as settled, even so far as the Divisional Court is concerned. This is something to be regarded with satisfaction if only because of the difficulty of reconciling Lord Goddard's decision with the judgment and even the *ratio decidendi* in *Woolmington's* case.

The effect on the burden of proof of a party's peculiar means of knowledge of a fact in issue

It is now necessary to turn to Lord Goddard's second reason for placing the burden of proving automatism on the accused. Lord Goddard said: " it is a rule of the law of evidence that the onus of proving a fact which must be exclusively within the knowledge of a party lies on him who asserts it." [15] The object of the following paragraphs is to suggest that this is an unduly wide formulation of the principle to be extracted from the authorities.

There are two rules of evidence relating to the effect of a party's peculiar means of knowledge of a fact in issue. First, there is the rule associated with *R.* v. *Turner* [16] that, " If a negative averment be made by one party, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative, is to prove it, and not he who avers the negative" (*per* Bayley J.). Secondly, there is the rule associated with the judgment of Holroyd J. in *R.* v. *Burdett*[17] that, once some evidence of a fact has been given, the weight of that evidence is increased by the failure of the opposite party to produce evidence which would be available if the fact were untrue.

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[15] [1958] 1 Q.B. at p. 282.
[16] (1816) 5 M. & S. 206.

R. v. Turner

Turner was charged with being in possession of game without lawful qualification contrary to a statute of the reign of Queen Anne. Some ten possible qualifications were mentioned in the statute, and it was held that it was not incumbent on the Crown to negative each of them. Lord Ellenborough said: "If the informer should establish the negative of any part of these different qualifications, that would be insufficient because it would be said, *non liquet*, but that the defendant may not be qualified under the other. And does not, then, common sense show that the burden of proof ought to be cast on the person who, by establishing any one of the qualifications, will be well defended?" The soundness of this doctrine seems to be beyond question. It is much easier to establish one affirmative than many negatives. Accordingly the party to whose case the affirmative is essential ought at least to bear the burden of producing evidence with regard to it. No particular significance need attach to Lord Ellenborough's use of the phrase "burden of proof" because, in his day, that burden was not distinguished from the burden of producing evidence.

What if the prosecution only has to prove one negative? The language of Bayley J. which has already been quoted was at least wide enough to cast the burden of producing evidence upon the accused. Up to a point this is also sound sense. In many cases it is more difficult to prove a single negative than the affirmative, but this is not so in the situations to which the rule in *R.* v. *Turner* has been applied by the most recent decisions. If a motorist is charged with driving without a licence, it ought not to be a great deal more difficult for the prosecutor to prove that the accused had not got a licence than for the accused to prove that he had one. Nevertheless, it has been decided that the prosecutor need not adduce any evidence tending to negative the possession of a valid licence by the accused.[18] In so holding, the Divisional Court was following a decision of the Court of Criminal Appeal,[19] and Ormerod J. (as he then was) said it seemed extraordinary that, "if a police officer sees somebody driving in a street, he can at once summon him and put him to proof that he has a licence."

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[17] (1820) 4 B. & Ald. 95, at p. 140. The distinction between the two rules is not stated with sufficient clarity in *Evidence* by Cross, pp. 76–77.

The words "put him to proof" show that the English language is the root cause of much of the difficulty surrounding the subject of the burden of proof. A man is "put to proof" when he is called upon to produce evidence, although it is equally common to say that someone is called upon to "prove" something when what is meant is that he will have failed to do so if he merely induces a belief that the probabilities are equal so far as the correctness of his contention is concerned. The language used in some of the judgments in which *R.* v. *Turner* has been considered may certainly be interpreted to mean that the burden of proving the affirmative of a negative averment which is peculiarly within his knowledge is borne by the accused, but the language may also be interpreted to mean no more than that the accused bears the burden of producing evidence. This interpretation would be more consistent with the principles enunciated in *Woolmington's* case.

Lord Goddard was undoubtedly speaking of the burden of proof and not merely of the burden of producing evidence when he said that the onus of proving a fact which must be exclusively within the knowledge of a party lies on him who asserts it. Even if this does not amount to a departure from previous authority, there is one respect in which Lord Goddard's rule is a considerable extension of that laid down in *R.* v. *Turner*. It omits the requirement that there must be a negative averment before the party within whose knowledge the affirmative lies can be called upon to prove it. It is aways possible to convert a positive averment into a negative one by the appropriate linguistic manipulation. The general requirement of the criminal law that the accused should have acted intentionally can be said to consist of allegations that he was not in a state of automatism, not ignorant of material facts and not unaware of the probable consequences of his conduct, but it is plain that the rule enunciated by Bayley J. in *R.* v. *Turner* has no application to the general defences available to the accused in most criminal cases. The rule must be confined to particular negative averments required by the definition of the crime charged.[20] According to all the authorities before *Hill* v. *Baxter*, it is only in these exceptional cases that the burden of proof as opposed to the burden of producing evidence can be borne by the accused at the outset of a criminal trial which is not governed by some special statutory provision. Even in these exceptional cases, there was no actual decision to the effect that it was the burden of proof and not simply the burden of producing evidence which was borne by the accused.

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[18] *John* v. *Humphreys* [1955] 1 All E.R. 793.

[19] *R.* v. *Oliver* [1944] K.B. 68.

R. v. Burdett

The relevant passage from the judgment of Holroyd J. in *R.* v. *Burdett* is as follows:

> "It is established as a general rule of evidence, that in every case the *onus probandi* lies upon the person who wishes to support his case by a particular fact, which lies more peculiarly within his own knowledge, or of which he is supposed to be cognisant. This, indeed, is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant of the crime with which he is charged; but when such proof has been given, it is a rule to be applied in considering the weight of evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce if the facts directly or presumptively proved were untrue."

A hundred years later Sargant L.J. made the same point in a civil case when he said:

> "The mere fact that no evidence is given by the other side is of no assistance in determining the question whether the evidence given by the plaintiff is sufficient to prove the fact which he has to prove, except, perhaps, where the defendant has, or may be presumed to have, evidence in his possession, and he does not bring forward that evidence. The fact that the defendant neglects to bring forward evidence which is in his possession and which would have enabled him to displace the other evidence, may be, in itself, sufficient, when added to the positive evidence given by the plaintiff,

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[20] There is a close affinity between the rule in *R.* v. *Turner* and the provision in s. 81 of the Magistrates' Courts Act, 1952 (re-enacting a similar provision in the Summary Jurisdiction Act, 1848), that where the defendant to an information or complaint relies for his defence on any exception, proviso, excuse or qualification the burden of proving it shall be on him.

> to make that evidence, which would not otherwise have been sufficient for the purpose in question."[21]

These quotations show that the rule under consideration is not concerned with the incidence of the burden of proof at the beginning of a trial, but with the shifting of the burden of producing evidence in the course of a case. Accordingly the judgment of Holroyd J. in *R.* v. *Burdett* is no authority for the existence of a rule of the law of evidence that " the onus of proving a fact which must be exclusively within the knowledge of a party lies on him who asserts it." When applied to facts such as those of *Hill* v. *Baxter*, the effect of the rule in *R.* v. *Burdett* is that, once it appears that the accused was going through the motions of driving, it will be assumed that he was conscious of what he was doing unless he produces sufficient evidence to raise a reasonable doubt whether this was the case.

The effect of Woolmington v. The Director of Public Prosecutions

Even if it was once the law that the burden of proof, not merely the burden of producing evidence, with regard to a fact which must be exclusively within the knowledge of a party lies on him who asserts it, the rule could hardly have survived *Woolmington* v. *The Director of Public Prosecutions.* The answer to the question whether his finger pressed the trigger of the gun involuntarily was exclusively within Woolmington's knowledge, but it was held that he did not bear the burden of proof on that or any other issue. If the effect of *R.* v. *Turner* was to cast on the accused the burden of proving the affirmative of a negative averment essential to the prosecution's case, it is at least arguable that the decision has been impliedly overruled by *Woolmington's* case. We have seen that *R.* v. *Turner* may have been solely concerned with the burden of producing evidence. If this is so, the rule laid down by Bayley J. does not conflict with anything said in Lord Sankey's speech in *Woolmington's* case. It may, however, be necessary to face the fact that several principles concerning the burden of proof in criminal cases at common law may have to be reconsidered in the light of *Woolmington* v. *The Director of Public Prosecutions.*[22]

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[21] *Stoney* v. *Eastbourne R. D. C.* [1927] 1 Ch. 367, at p. 405.

[22] For example, what is the position in a criminal case with regard to a rebuttable presumption of law which shifts the burden of proof in a civil case? If H. is charged with incest with his daughter, born two years after H.'s marriage to her mother, and H. alleges that the girl is the child of another man, does H. bear the burden of negativing the girl's legitimacy? In a civil case he would bear the burden of doing so beyond reasonable doubt, but it may well be the law that someone accused of

Conclusions

The points which it has been endeavoured to make in this article may be summarised as follows: (1) the judgments of Devlin J. in *Hill* v. *Baxter* and Lord Goddard C.J. in *R.* v. *Lobell* are to be welcomed because they stress the importance of the distinction between the burden of proof and the burden of producing evidence; (2) the fact that *Hill* v. *Baxter* does not constitute a unanimous decision of the Divisional Court that the burden of proving automatism is borne by the accused is also to be welcomed; and (3) one of the rules stated by Lord Goddard C.J. in *Hill* v. *Baxter* was too widely formulated. This is the rule that the onus of proving a fact which must be exclusively within the knowledge of a party lies on him who asserts it. This rule is not fully supported by the older authorities if it alludes to the burden of proof as opposed to the burden of producing evidence, and, if there ever were such a rule, it is doubtful whether it has survived the decision of the House of Lords in *Woolmington* v. *The Director of Public Prosecutions.* No attempt has been made to question the soundness of the rule if it merely refers to the burden of producing evidence, but Lord Goddard C.J. does not appear to have had this lighter burden in mind when speaking of the "onus of proving a fact" because he likened it to the burden borne by the accused in the case of insanity and it is beyond question that this burden is the burden of proof.

The Wolfenden Report in Parliament

On November 26, 1958, the Home Secretary moved that the House takes note of the Report of the Committee on Homosexual Offences and Prostitution.[1]

Opening the debate Mr. Butler expressed his thanks to Sir John Wolfenden and the Committee who had prepared the Report; he

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incest only has the burden of producing evidence with regard to illegitimacy, leaving the burden of proving legitimacy with the Crown. This latter view would be consistent with *Woolmington's* case. Another possibility would be to hold that the accused bears the burden of proving illegitimacy on a preponderance of probability. There does not appear to be any relevant decision on the point since 1935.

[1] Cmnd. 247. See [1957] Crim.L.R. 665.

then outlined the Committee's terms of reference, drawing attention to the fact that questions of theology and morals were outside these terms of reference and should, therefore, be eliminated from the debate.

Mr. Butler then went on to consider what he called " one of the perennial dilemmas of organised society. That is, how far the law and the compulsion of the law should seek to regulate the behaviour of individuals." The Committee had achieved its conclusions working on the basis that the function of the law in regard to sexual behaviour was threefold: first, to preserve public order and decency; secondly, to protect the citizen from what is offensive and injurious; and thirdly, to provide sufficient safeguards against exploitation and corruption. The difficulties arose in construing for the purposes of the second function, the words " offensive " and " injurious."

The Home Secretary then reviewed briefly the history of homosexuality and the Committee's recommendation that homosexual conduct between consenting adults in private should cease to be a criminal offence. The argument that to treat such conduct as a crime is to carry the criminal law beyond its proper sphere and is, therefore, to undermine the moral responsibility of the individual was a compelling one, but it was an argument which could only be accepted if one was convinced that society would not be harmed by leaving homosexual conduct in private as a matter for private conscience. Mr. Butler then said that many people were, at this time, uncertain as to the answer to this question. What had to be considered was the present situation and, since an impression, albeit erroneous, had gained ground that the Wolfenden Committee wanted to make homosexual conduct easier, education and time would be necessary to bring people to understand what it was that the Committee were really trying to do, that is, that while they did not want to encourage homosexual practices, they did want them removed, like adultery and other sins, from the realm of the criminal law.

The impression that the removal of criminal sanctions for homosexuality implied condonation of it was entertained by many people, and to remove those sanctions might mean to remove from those who are outside the influence of religion the only support they have for their notions of right and wrong. The Government are, therefore, satisfied that they would not be justified in proposing legislation to carry out the recommendations of the Committee.

Having said that, Mr. Butler went on to say that he was fully aware of the suffering caused by the present state of the law, by the scope it offered for blackmail and by the unsuitableness of imprisonment as a punishment for the crime. Finally, he said that, in this field, as in many others, more knowledge was needed. Little is known of the causes or extent of homosexual conduct and, in the absence of knowledge, it was not possible to judge adequately the consequences of any action which might be taken. It was hoped that arrangements for research into the subject could be made, the only reservations arising from the demand of other forms of research, and the facilities available.

The Home Secretary then turned to the Committee's recommendations on prostitution. Here again, although the Committee was concerned only with the law, the social problem behind the law was bound to be considered. Much thought had been given to the Committee's findings but the House was conscious of the gulf which separates " what we wish to do and what we can achieve." The discussions on the recommendations as to homosexuality had revealed deep disagreement upon what it would be desirable to do. Here there was little disagreement on what would be desirable: the question was " What is possible? "

Mr. Butler then considered briefly the question of reclaiming girls who take to prostitution, saying: " We propose to practise every art of redemption which we can practise in dealing with this problem."

On the specific recommendations, Mr. Butler said, first, that he accepted the recommendation that any new legislation on prostitution should do away with the requirement that annoyance should be established. The other proposals were that maximum penalties should be increased, that a system of progressively higher penalties should be introduced and that this should culminate in sentences of three months' imprisonment for the third and subsequent offences.

Mr. Butler then went on to consider the practical aspects of " cleaning up the streets " ; he did not think that a police drive would be sufficient.

In considering new legislation it was most important that the law must not expose an innocent woman to any danger of arrest for loitering or soliciting, nor must the law impose on the police an impossible burden of proof. An ingredient of prostitution as an offence must, therefore, be that the woman is a known prostitute or that she has solicited with a degree of persistence indicating a habit or a way of life.

Legislation to enable men associating with prostitutes to be charged would not be feasible; the problem of identification was almost impossible to solve: it was not the man's persistent presence which was offensive and injurious. It was that of the woman.

On the question of persons living on the immoral earnings of prostitutes, the Home Secretary did not feel that the conclusions of the Committee that the present maximum penalty of two years' imprisonment was sufficient, were not firm enough. If it were decided to take action on the recommendations of the Committee, he had no doubt that they would accept the reservation of Mrs. Cohen, Miss Lovibond and Lady Stopford, that the penalty be increased to a maximum of five years' imprisonment.

A final aspect of the findings of the Committee was the question of premises used for prostitution. He, himself, could see no way of empowering the courts to determine tenancies or requiring their assignment which would not override the rights of innocent sub-tenants.

The Home Secretary then invited the House to give their views on both these subjects.

In the ensuing debate, most shades of opinion were brought to light on both these topics. In a frank and enlightened debate, the House, freed from the shackles of party politics, showed that they had given the Wolfenden Report the thought which it required. The Home Secretary received much support both for his decision to refrain from acting on the recommendations on homosexuality and for the steps which the Government were contemplating in respect of prostitution.

The measure of the approval accorded to Mr. Butler's proposals is, perhaps, reflected in the clauses of the Street Offences Bill, which was presented to the House on December 18, 1958.

The Bill proposes that the requirement of proving "annoyance" should be removed from the definition of the offence of loitering or soliciting for the purposes of prostitution. It will still be necessary, however, to prove that the offender is a common prostitute. The Bill proposes maximum penalties for this offence as follows: a fine of up to ten pounds for a first offence, or twenty-five pounds for a second offence. For subsequent offences a maximum fine of twenty-five pounds or a sentence of up to three months' imprisonment, or both, is proposed.

It is proposed that the maximum penalty for living on the earnings of prostitution or exercising control over prostitutes be increased to five years' imprisonment. The fines for offences in connection with unlicensed all-night cafés and refreshment houses will also be greatly increased if the Bill becomes law.

Practice and Procedure

Road Traffic Offences

Indorsement and disqualification orders and drivers from abroad

With foreign visitors coming to this country in ever increasing numbers, our courts more and more frequently find themselves concerned with motoring defendants who have no driving licence issued in Great Britain. Article 2 of the Motor Vehicles (International Circulation) Order, 1957, makes it possible for a person resident outside the United Kingdom to use here for twelve months, in substitution for a county council licence, either an International Driving Permit in the form sanctioned by international agreement or "a domestic driving permit issued in a country outside the United Kingdom." In addition, by virtue of Article 3 of the Order, members of visiting forces may drive unlicenced in this country if they hold a driving permit issued either in their country of origin or by their service authorities.

If the holder of a valid driving permit of one of the kinds mentioned is made the subject of an indorsement or disqualification order following conviction, the court "shall in no circumstances enter any particulars" on the permit (see paragraph 2 (2) of the Third Schedule to the Order). The procedure to be followed in such an eventuality is set out in paragraphs 2 (1) and 3 of that Schedule. The court is required to send particulars of the conviction to the Minister of Transport and Civil Aviation; and, if there has been a disqualification order, the holder of the permit "shall, if so required by the court, produce his driving permit within five days, or such longer time as the court may determine, and the court shall forward it to the Minister." The Minister is to record particulars of any disqualification on the driving permit, to notify the issuing authority, and to retain the permit until the holder leaves Great Britain or the disqualification period expires, whichever is the earlier. The Order is, however, silent as to what action the Minister is to take when informed of an order of indorsement only.

Under the terms of paragraph 3 (1) of the Third Schedule, a convicting court is authorised to require the production of a permit to which the Order applies, only in the case of a disqualification order. Paragraph 3 (3) makes failure to comply with such a requirement an offence under the Road Traffic Act, 1930. No provision seems to have been made, however, to secure that orders of indorsement become effective in any way. Paragraph 5 of the Third Schedule enumerates the sections of the Road Traffic Act, 1930, in which references to a driving licence are to include references to a driving permit. They are section 4 (5), which concerns production of a licence by a driver to a constable; section 20 (2), which authorises the arrest of an offending driver who has failed to produce his licence to a constable; and section 112 so far as it relates to the unauthorised use and the forgery of driving licences. In view of this severely restricted list of sections, the holder of a driving permit cannot be treated as the holder of a driving licence for the purposes of section 8 (2) which enacts: "Where an order is made requiring any licence held by an offender to be endorsed, then—(a) if the offender is at the time the holder of a licence, he shall, if so required by the court, produce the licence within five days or such longer time as the court may determine for the purpose of endorsement." For the same reason, the holder of a driving permit who is charged with exceeding a speed limit, dangerous driving, careless driving, or driving under the influence of drink, cannot be required under section 33 of the Road Traffic Act, 1934, to have it with him at the hearing if he has not sent it to the court beforehand; and, similarly, he cannot be required to produce it to the court on conviction for one of these offences.

In practice, standard forms of summonses and notices to produce will probably be used for all defendants to whom the provisions of section 8 (2) of the 1930 Act or section 33 of the 1934 Act would appear, on the face of it, to apply. And experience shows that, in most cases, the defendant will, himself—whatever the law may say—treat references to a driving licence as references to a driving permit; and he will comply, on that basis, with any requirements made on him. The fact remains that, should voluntary compliance not be made in this way, it will be difficult to carry out fully what the relevant legislation intends. The court cannot fulfil its obligation to send to the Minister particulars of an indorsement ordered in the case of a holder of a driving permit unless it knows that he is in that category. If he does not produce his permit, the court will not know this—unless the police, having used their own powers to require production, volunteer information which there is no duty on them to pass to the court. A hiatus seems to have occurred in the provisions of the Motor Vehicles (International Circulation) Order, 1957, which has now replaced the previous subsidiary legislation covering the subject.

It is to be noted that Northern Ireland driving licences are specially dealt with in section 32 of the Road Traffic Act, 1930.

The holder of such a licence may use it in Great Britain as if it had been issued here. If he is disqualified in this country he must produce his licence to the court and the court must forward it to the Minister. No indorsement must be made on the licence, but, in any case where the court would have ordered indorsement if the offender had held a licence issued in Great Britain, particulars of the conviction must be sent to the Minister. In addition, it is specifically laid down that the holder is " under the like obligation to produce such a licence as if it had been a licence granted under this Part of this Act, and the provisions of this Part of this Act as to the production of licences granted thereunder shall apply accordingly." The inclusion of some such comprehensive words in the Order of 1957 would have been of assistance to courts which are faced with the task of making its provisions effective.

A. E. JONES.

Preventive detention

Prison Commissioners' Report

In *R.* v. *Kavanagh* (reported as to reduction of sentence, *post*, p. 62), Lord Parker C.J., giving the judgment of the court, stated that it did not appear anywhere on the transcript that the Prison Commissioners' Report had been given to the accused or to his legal representative. In these cases it should be made to appear on the shorthand note that the Prison Commissioners' Report, pursuant to section 21 (5) of the Criminal Justice Act, 1948, had in fact been given either to the accused or to counsel or to the solicitor representing him. [H. P.]

Summary Justice

Agriculture

Fines totalling £45, with 10 guineas costs, were recently imposed on a firm of agricultural spraying contractors. The firm was prosecuted under the Agriculture (Poisonous Substances) Regulations for permitting two of its employees to carry out spraying operations with a scheduled poisonous substance without wearing the prescribed protective clothing, and for failing to provide the employees with adequate personal washing facilities. The employees were granted a conditional discharge on payment of costs. (Ministry of Agriculture, Fisheries and Food, Circular 438/58.)

Firearms

For firing a gun within 50 feet of a highway, contrary to section 72 of the Highway Act, 1835, a man was fined £1 and bound over for twelve months to keep the peace on his own surety of £5. He told the court that his house had been "terrorised" by gangs of children, who knocked on the door and ran away—there had been no disturbances since the firing incident; Blackhall: Runcorn Magistrates' Court (*Liverpool Echo*, November 7, 1958).

Case and Comment *

ACCESSORY

Receiving—enabling criminal to realise proceeds of his crime

R. v. Poole and Blake

Borough of Andover Quarter Sessions: Edgar Fay, Esq., Q.C., Recorder: November 4, 5 and 6.[1]

The defendants Poole and Blake were jointly charged with breaking and entering premises; Poole was further charged with garagebreaking and larceny; and Blake was further charged with receiving part of the property stolen from the garage, and with being accessory after the fact to Poole's garagebreaking and larceny of tyres, another part of the stolen property. Poole pleaded guilty and Blake not guilty to all counts in which they were respectively concerned and Poole was called to give evidence against Blake.

In support of the count alleging that Blake was an accessory after the fact the evidence led by the prosecution was that, with knowledge that Poole had stolen the tyres, Blake offered them for sale to several persons whom he thought might be interested in their purchase.

At the close of the case for the prosecution, it was submitted on behalf of the defence that the evidence led did not support the count charging Blake as an accessory after the fact, because there was no evidence that what was done by him was done in order to hinder the arrest, apprehension, trial or punishment of the principal felon. Reliance was placed on Archbold's *Criminal Pleading, etc.*, 33rd ed., p. 1507, paras. 2775, 2779 and 2784 and particularly the paragraph headed " Direction to jury " in the last-mentioned paragraphs. The following authorities were cited: *R.* v. *Watson,* 12 Cr.App.R. 62; [1916] 2 K.B. 385; *R.* v. *Butterfield* (1843) 1 Cox 39; *R.* v. *Levy,* 7 Cr.App.R. 61; [1912] 1 K.B. 158; *R.* v. *Chapple* (1840) 9 C. & P. 355; *R.* v. *Jones,* 33 Cr.App.R. 33; [1949] 1 K.B. 194; *R.* v. *Smith* (1870) L.R. 1 C.C.R. 266.

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* Reported, unless otherwise stated, by David Calcutt and Henry Palmer, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the prosecution: *John Main* (instructed by MacDonald Jacobs & Oates, Portsmouth). For the defence: *Eric McCullan* (instructed by Kingswell & Berney, Gosport).

After hearing argument, the Recorder, principally on the authority of *R.* v. *Butterfield* (*supra*) held that there was evidence to support the count. He directed the jury in the following terms: " Blake is an accessory if, knowing that Poole committed a theft, he assisted Poole to dispose of the proceeds of that theft . . . he becomes an accessory by going round looking for customers who would take the goods off Poole's hands and assisting him to realise the proceeds of his crime." He indicated that the point was difficult and that if a certificate were considered necessary or desirable to expedite the matter being dealt with by the Court of Criminal Appeal he would readily grant one.

In the result, however, Blake was acquitted on all counts.

[Reported by T. R. FITZWALTER BUTLER and ERIC B. MCLELLAN, *Barristers-at-Law*.]

Commentary. One who does not himself receive stolen goods but merely directs the thieves or receivers to a place where they might conveniently dispose of the stolen property cannot be convicted of receiving as a principal: *R.* v. *Watson* (above).

It is generally said that it is necessary to show that the accessory after the fact gave assistance to the felon with the object of enabling him to evade arrest, trial or punishment. An accessory after is one who gives favour and aid to the felon " that he be not knowne ": Coke, 2 Inst. 183; and see Hawkins P.C. b. 2, c. 29, s. 26.

The direction in the present case seems to depart from this principle; enabling the prisoner to realise the proceeds of his crime is by no means the same thing as enabling him to evade justice. The direction given does not seem, with respect, to be warranted by *R.* v. *Butterfield* (above). In that case it was argued that " Harbouring, etc., means doing something to enable the prisoner to escape "; and that evidence which showed merely that the accused had assisted the thief to make away with the stolen property did not support the indictment. The prosecution contended that it was enough if the prisoner, knowing a felony to have been committed, enabled the felon to obtain the fruits of that felony. Maule J. ruled that there was evidence to go to the jury. He said, however, " Here the prisoner assists the party who has stolen the goods to get rid of them, *and thus evade the justice of the* *country* "; and, in directing the jury, he referred to "suppressing the important evidence of the possession of the note." Maule J. did not, therefore, ignore the traditional requirement that the assistance must have been given to enable the prisoner to escape justice. It would follow from this requirement that a receiver of stolen goods is not, as such, an accessory; and, consequently, Dr. Williams thinks *Butterfield* "a doubtful case"; though he adds, "A receiver would be a party if his purpose were to suppress the evidence": *The Criminal Law*, § 67, n. 19.

The motive with which an act is done is usually irrelevant in criminal law: see, *e.g.*, *National Coal Board* v. *Gamble* [1958] 3 W.L.R. 434; [1958] Crim.L.R. 682, where it was held irrelevant on a charge of being an aider and abettor. The law relating to accessories after the fact would seem, however, to be one of the exceptions to this general rule; so if the accused knowingly does acts which have a tendency to enable a felon to evade justice, but with the motive of avoiding his own arrest, he is not an accessory after the fact: *R.* v. *Jones* [1949] 1 K.B. 194.

BANKRUPTCY

Obtaining credit without disclosing bankruptcy—fraud

R. v. Goodall

Court of Criminal Appeal: Lord Parker C.J., Cassels and Diplock JJ.: November 3, 1958: *The Times*, November 4, 1958.[2]

G. was convicted at quarter sessions, *inter alia,* on five counts of obtaining credit without disclosing that he was an undischarged bankrupt contrary to section 155 of the Bankruptcy Act, 1914. The facts were that G.'s wife was the leaseholder of premises which she and G. were minded to convert into three flats. As a result of advertisements inserted in newspapers three persons paid sums of money for or towards the cost of conversion. G. himself told the applicants the purpose for which the moneys were required and held himself out as the builder, but the moneys were paid over by cheque and the cheques were in fact made out either to the wife or to the firm of which she was the proprietor. There was no question of fraud. On appeal to the Court of Criminal Appeal:

Held, allowing the appeal, that the question whether a man who obtained money on the faith of a promise to supply goods or to render services in the future was obtaining credit was one which would one day have to be looked at with very great care. In the present case it was unnecessary to decide the point because, on the facts, it could not be said that G. obtained credit at all. If credit were obtained it might well have been obtained by the wife or by the firm of which she was proprietor. In the circumstances the conviction on the five counts would be quashed. [H. P.]

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[2] For the appellant: *F. R. Lewis-Heath* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *S. A. Morton* (instructed by the Director of Public Prosecutions).

Commentary. There is no necessity to prove fraud on a charge under section 155 of the Bankruptcy Act, 1914. It has been held that it is an obtaining of credit for the purposes of section 13 of the Debtors' Act, 1869, to obtain in advance the price of services to be rendered in the future: *R.* v. *Ingram* [1956] 2 Q.B. 424. There seems no reason why the rule should not be the same under section 155 of the 1914 Act; but *Osborn* v. *Barton* (1950) 66 T.L.R. (Pt. 1) 115 (which was somewhat unsatisfactorily distinguished in *Ingram*) presents difficulties.

On the whole question see Mr. Turner's Appendix I to Kenny's *Outlines of Criminal Law* (17th ed.), 597, and Mr. D. W. Elliott, "Obtaining Credit by Fraud" (1956) 72 L.Q.R. 548.

BENCH WARRANT

Failure to surrender to bail—absconding after conviction—refusal of bench warrant on ground of no jurisdiction

R. v. Lloyd-Jones and another, ex p. Thomas

Queen's Bench Divisional Court: Lord Parker C.J., Streatfeild and Diplock JJ.: October 27, 1958: [1958] 1 W.L.R. 1110.[3]

P. was convicted of larceny before the justices, who committed him to sessions for sentence. P. gave notice of his intention to appeal against his conviction, and was granted bail pending the hearing of his appeal. On the hearing of the appeal, P. failed to surrender to his bail. The appeal was dismissed. The police applied to the assistant recorder for a bench warrant for P.'s arrest. The assistant recorder refused to issue a warrant, being of the opinion that he had no power to do so, since P. had not been committed to quarter sessions on indictment. The police then applied to the vacation judge for an order for the issue of a warrant; but the judge refused to issue a warrant, being of the opinion that he had no power to issue a warrant either. The police applied to the Divisional Court for an order of mandamus directed to the recorder, or alternatively to the assistant recorder, requiring him to issue a warrant.

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[3] For the applicant: *J. F. E. Stephenson* (instructed by Theodore Goddard & Co. for Town Clerk, Cardiff). The respondents did not appear and were not represented.

Held, that the assistant recorder had had power to issue a warrant, and that the order of mandamus should issue accordingly.

Per Lord Parker C.J.: "It will be observed that by section 29 (3) of the Criminal Justice Act, 1948, it is provided 'Where an offender is so committed for sentence as aforesaid, the following provisions shall have effect, that is to say: (*a*) the appeal committee or court of quarter sessions shall inquire into the circumstances of the case, and shall have power to deal with the offender in any manner in which he could be dealt with by a court of quarter sessions before which he had just been convicted of the offence on indictment.' It is clear from that that when quarter sessions begin to inquire into the matter with a view to dealing with the offender, they are put in the same position as if the offender had just been convicted before them on indictment."

[D. C.]

Commentary. The effect of section 29 (3) was the same as if the prisoner had just been convicted before the recorder and had absconded during the mid-day adjournment. Lord Parker C.J. appeared to be of the opinion that, apart from the statute, there is an inherent power in the court seised of the matter to issue a bench warrant where a prisoner fails to surrender to his bail; but it was, of course, unnecessary to decide that point.

COURT OF APPEAL

Jurisdiction—Fugitive Offenders Act, 1881—criminal cause or matter

See **R. v. Governor of Brixton Prison, ex p. De Demko** (p. 53, *post*)

CUSTOMS AND EXCISE

Forfeiture—oil for home consumption used in vehicles—duty not repaid—forfeiture of vehicles

Commissioners of Customs and Excise v. Jack Bradley (Accrington), Ltd.

Queen's Bench Division: Lord Parker C.J.: [1958] 3 W.L.R. 639.[4]

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[4] For the Commissioners of Customs and Excise: *Rodger Winn* (instructed by the Solicitor, Commissioners of Customs and Excise). For the defendants: *J. M. E. di Nahum, Q.C.*, and *Harry Hague* (instructed by Sharpe, Pritchard & Co. for Richard Pate & Co., Accrington).

B., who had purchased 61,500 gallons of oil, on which he had paid duty, claimed, and was granted, a rebate of the duty on the ground that the oil had been delivered to him for home consumption. Subsequently some of the oil was found in the tanks of some of B.'s motor-vehicles. Since B. had not repaid the duty on the oil found, that oil became liable to forfeiture under section 200 (3) of the Customs and Excise Act, 1952. The question arose whether or not the vehicles in which the oil had been found also became liable to forfeiture under section 277 (1) of the Act.

Section 277 provides: "(1) Without prejudice to any other provision of this Act, where any thing has become liable to forfeiture under the customs or excise Acts—(*a*) any ship, aircraft, vehicle, animal, container . . . or other thing whatsoever which has been used for the carriage, handling, deposit or concealment of the thing so liable to forfeiture, either at a time when it was so liable or for the purposes of the commission of the offence for which it later became so liable; and (*b*) any other thing . . . found with the thing so liable, shall also be liable to forfeiture."

Held, that the vehicles had "been used for the carriage of" the oil within the meaning of the section for the "purposes of the commission of the offence" and that the vehicles accordingly also became liable to forfeiture. [D. C.]

Commentary. This case has been fully considered by Mr. D. W. Elliott in an article, "Forfeiture under the Customs Laws," [1958] Crim.L.R. 786.

Scrap metal—knowingly concerned in the exportation—knowingly concerned in attempting to evade prohibition—proviso to section 4 (1), Criminal Appeal Act, 1907, applied

R. v. Miller and Hanoman, Ltd.

Court of Criminal Appeal: Lord Parker C.J., Cassels and Diplock JJ.: November 10, 1958: *The Times*, November 11, 1958.[5]

The appellants were convicted at the Central Criminal Court of a number of offences against section 56 (2) of the Customs and Excise Act, 1952. The facts were that, there being in force a prohibition against the exportation of scrap metal to the Continent, the appellants sold old Bailey bridges at a price higher than that of scrap and then allowed rebates in order to bring the price down to that of scrap. There was no prohibition in force against the exportation of manufactured goods. Section 56 (2) of the Act provides that: " Any person knowingly concerned in the exportation . . . or in the attempted exportation . . . of any goods with intent to evade any such prohibition or restriction as aforesaid shall be liable to a penalty . . . " In the indictment the " statement of offence " was in each case in the following form: " Being knowingly concerned in attempting to evade a prohibition on the export of goods contrary to section 56 (2) of the Customs and Excise Act, 1952." M. and H., Ltd., appealed to the Court of Criminal Appeal on the main ground that the indictment was defective in that the offences were wrongly described therein.

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[5] For the appellants: *Victor Durand, Q.C.*, and *W. R. Rees-Davies* (instructed by Messrs. Alan, Edmunds and Phillips). For the Crown: *Malcolm Morris* (instructed by the Solicitor, H.M. Customs and Excise).

Held, dismissing the appeal, that under the Indictments Act, 1915, every indictment must contain a statement of the specific offence with which the accused was charged and the statement of offence must describe the offence shortly in ordinary language. Here the words which purported to set out the offence misdescribed it by stating " being knowingly concerned in attempting to evade a prohibition " as opposed to " being knowingly concerned in the exportation of goods." The fact that the particulars of the offence correctly described the offence could not cure the defective statement of offence. The trial judge had wrongly overruled an objection to the form of the indictment but, if he had not, it was clear that he could and would have allowed the indictment to be amended. However, this was plainly a case where no substantial miscarriage of justice had occurred so that the court, whilst deciding in favour of the appellant on the point of law, would apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, and would dismiss the appeal. [H. P.]

Commentary. Section 56 (2) appears to create at least two offences: (1) being " knowingly concerned in the exportation . . . " and (2) being " knowingly concerned in the attempted exportation . . . " *Cf. Thompson* v. *Knights* [1947] 1 K.B. 336, where the Divisional Court held that the words of section 15 of the Road Traffic Act, 1930, " when driving or attempting to drive or when in charge of . . . " create three offences. See also *Bastin* v. *Davies* [1950] 1 All E.R. 1095. In such cases it is necessary for the indictment to specify the particular offence which is charged. In the present case the indictment did not specify either of the two offences which the section appears to create.

EVIDENCE

Admissibility—similar modus operandi—two offences charged in same indictment—property stolen in each being found in same house frequented by accused persons

R. v. Riley and others

Central Criminal Court: November 13 and 14, 1958[6]: The Common Serjeant of London.

Count 1 charged R., M. and D. with robbery with violence on May 30, 1958. Count 3 charged the same three men with robbery with violence on June 10, 1958. After plea but before opening the prosecution asked for a ruling as to whether they might lay before the jury as evidence on count 1 evidence of a similar *modus operandi* being employed in the commission of that offence as that employed in the commission of the offence charged in count 3, and evidence of property taken during the commission of the first offence being found in the same house as property taken during the second offence and of the frequenting of that house by the accused. The prosecution quoted *R.* v. *Robinson* (1953) 37 Cr.App.R. 95, 101–102, but admitted that the present case was distinguishable as here there was no other evidence against the accused on the first count (the evidence of possession of stolen property not being sufficiently recent).

Held, in the circumstances of the present case the evidence in question should not be admitted.

The prosecution thereupon stated that they would not proceed with count 1 and asked for a separate trial of R. on count 3, to which M. and D. had pleaded guilty, as if counts 3 and 5 (larceny from dwelling-house) were tried together the fact that M. and D. had confessed to count 3 would be prejudicial to them on count 5. On Riley being tried separately on count 3 he was found guilty and sentenced to four years' imprisonment. M. and D., who pleaded guilty to counts 2 (receiving), 3 and 6 (receiving), were sentenced to seven years' imprisonment and five years' imprisonment respectively on count 3 and to twelve months' imprisonment on each of counts 2 and 6, concurrent with each other and with the first term. The other counts against R., M. and D. were not proceeded with. [C. B. ORR, *Barrister-at-Law.*]

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[6] For the prosecution: *Edward Clarke* (instructed by The Metropolitan Police Solicitor). For Riley: *E. G. L. Du Cann* (instructed by Sampson & Co., St. Brides St., E.C.4.). For Mason: *West-Russell* (instructed by V. Lissack, Floral St.). For Duval: *Harman* (instructed by the court).

Commentary. In *R.* v. *Robinson* where the accused was charged with similar offences in two counts Lord Goddard C.J. directed the jury that, if they came to the conclusion that R. was the man who committed the first offence, they were entitled, in considering the second count, to take into account the similarity between the first and the second. The Court of Criminal Appeal held that this direction was correct. If there had been no sufficient evidence on the first count, such a direction would not have been possible; and this was the position in the present case.

EXTRADITION

Fugitive Offenders Act, 1881 — appeal against order — Court of Appeal—jurisdiction

R. v. Governor of Brixton Prison, ex p. De Demko

Court of Appeal: Lord Evershed M.R., Sellers and Pearce L.JJ.: [1958] 3 W.L.R. 624.[7]

In February, 1958, D., who was then resident in the United Kingdom, was arrested on a warrant, issued in South Africa, which set out a number of offences which D. was alleged to have committed in South Africa. In June, 1958, D. was brought before a metropolitan magistrate, who, finding a prima facie case made out against D., committed him to prison to await his return to South Africa.

D. had applied to the Divisional Court for a writ of habeas corpus and for an order granting relief pursuant to section 10 of the Fugitive Offenders Act, 1881. Both applications were refused. D. appealed to the Court of Appeal.

Held, that, as in habeas corpus proceedings, the Court of Appeal has no appellate jurisdiction in cases involving a criminal cause or matter, so under the Fugitive Offenders Act, 1881, it has no such jurisdiction; the jurisdiction conferred on the Court of Appeal by section 39 of the Fugitive Offenders Act, 1881, was original and not appellate. The court accordingly had no jurisdiction to entertain the appeal. [D. C.]

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[7] For the appellant: *F. H. Lawton, Q.C.*, and *P. A. W. Merriton* (instructed by Beach & Beach). For H.M. Secretary of State for Home Affairs and the Governor of Brixton Prison: *Sir Harry Hylton-Foster, Q.C., S.-G., Rodger Winn* and *Basil Wigoder* (instructed by the Director of Public Prosecutions). For the Government of South Africa: *J. C. Phipps* (instructed by Jaques & Co.).

Commentary. Section 31 (1) of the Judicature Act, 1925, replacing section 47 of the Judicature Act, 1873, enacts that "No appeal shall lie except as provided by the Criminal Appeal Act, 1907, or this Act, from any judgment of the High Court in any criminal cause or matter." There was no doubt that the offences with which the applicant in the present case had been charged amounted to a "criminal cause or matter"; but section 26 (2) (*d*) of the Act preserves all jurisdiction which came into force after the 1873 Act. It was, therefore, possible to argue that an appellate jurisdiction, conferred by section 10 of the Fugitive Offenders Act, was expressly preserved; and that the words "or this Act" in section 31 (1) referred back to section 26 (2) (*d*). The question was, therefore, whether the jurisdiction conferred on the Court of Appeal by the Fugitive Offenders Act was original or appellate, or both. The argument in favour of appellate jurisdiction was that it was implicit that the jurisdiction conferred must include the function which the court normally performs. There was no binding authority to the effect that the court had no appellate jurisdiction; but the Court of Appeal had held in *R.* v. *Governor of Brixton Prison, ex p. Savarkar* [1910] 2 K.B. 1056 that it had original jurisdiction. It was obviously extremely improbable that the court was intended to have both original and appellate jurisdiction; both Vaughan Williams and Buckley L.JJ. in *Savarkar's* case thought it necessary to make a choice, and the court so held in the present case. As there was already binding authority that the court had original, it followed that it had no appellate jurisdiction. The court thought, moreover, that, apart from the implications of *Savarkar's* case, the proper interpretation of the words of the Act was that an original, and not an appellate, jurisdiction was intended.

Leave has been given to appeal to the House of Lords.

FRAUDULENT CONVERSION

Director of private company—intent to defraud

R. v. Lyon

Central Criminal Court: the Common Serjeant of London: September 28, 1958.[8]

In an indictment containing twenty counts the defendant was charged, in the first 19 counts, with fraudulent conversion of sums of money the property of Ronald Lyon & Co., Ltd., of which he was a director and, in the twentieth count, with fraudulent trading. During the course of the prosecution evidence the prosecution indicated that they could not ask the jury to convict on the twentieth count, and, accordingly, would offer no further evidence on it. The defendant was thereupon acquitted on that count.

The defendant started trading while he was still at school and his business continued to grow. One of his ventures was to buy Nissen huts, recondition them or build new huts, etc., with materials salvaged from them. A considerable amount of scrap accumulated but was at the time considered valueless. Eventually a limited company was formed to take over the business. All the property and liabilities of the old business were taken over by the company. Later some of the property was excluded from the take-over. It later became apparent that the scrap pieces of iron sheeting had a value; the defendant sold it and put the proceeds in his pocket without accounting to the company. He also took, in cash, part of the proceeds of auction sales of huts, etc., sold by the company and did not account to the company; the auctioneers' commissions on the sums taken in cash by the defendant were paid by the company disguised as expenses of the sales.

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[8] For the prosecution: *E. S. Fay, Q.C.*, and *Neville M. G. Faulkes* (instructed by The Solicitor for the Board of Trade). For Ronald Lyon: *Griffith-Jones* and *Muir Hunter* (instructed by Messrs. Hextell, Erskine & Co.).

The defendant's case was that the scrap never passed to the company and was his own to deal with as he chose and that the huts, etc., sold by auction incorporated materials belonging to him personally, and so he was entitled to receive payment for his materials out of the sales proceeds. He had bought the Nissen huts, etc., with money provided by his father and that he used the money obtained by the sale of scrap and from the auction sales to repay his father and that the transactions were done in cash and not put through the books of the company as his father wished to keep the matter secret. In any case the Memorandum of Association of the company contained a power to distribute among the members of the company in kind any property of the company; he, his father and a third person, who held his shares under a special agreement, were the sole owners of shares and so he, as managing director, was entitled to give the property of the company to his father if he in fact had done so and owing to the special relationship of the shareholders, only he and his father stood to lose if the company lost.

In the course of argument as to the necessary intent to defraud, whether it was the company or the shareholders, creditors being excluded as a result of acquittal on count 20, who had to be defrauded and whether it could include an intent to defraud the Inland Revenue, the prosecution quoted the unreported case of *R.* v. *Channell*, Court of Criminal Appeal, March 20, 1951, in which Lord Goddard said: " Many people, as it is called, form themselves into companies, which is a wholly inaccurate expression. What they do is that they form a company, and they no doubt get certain advantages in doing that because the people who give credit to the company can only look to the company, and cannot look to the individuals who form the company, to be paid. That is one advantage you get out of forming a company, but you have then to remember that the company is a distinct legal entity from yourself. You cannot have the best of both worlds, or the worst of both worlds. If you have a company, of course it becomes liable. You, the person who has formed the company, cannot appropriate the moneys of the company, because if you do you are putting the company in the position of being able to defraud its creditors, because if you take all the money for yourself you are not liable to the creditors, but you are preventing the company from being able to pay them. That is what has been happening here."

In summing up his Lordship instructed the jury that it had been submitted that the articles of the company gave the defendant power to use the property of the company as he liked, but the articles did not give a licence for dishonesty. That the jury, in order to convict, must be sure that the property, scrap or materials, was the property of the company and that the defendant knew it was the property of the company and that he had no right to apply it to his own uses. If the defendant genuinely regarded this property and any other the property of the company as his own to use as he pleased, then there was no intent to defraud the company. If, however, he possessed himself of the property of the company to the detriment of the company to enrich himself that would amount to an intent to defraud. If the defendant genuinely believed he had the right to use the property as he did he must be acquitted.

The defendant was found not guilty on all counts.

[C. B. ORR, *Barrister-at-Law*.]

Commentary. A claim of right made in good faith is incompatible with fraud and should, therefore, afford a defence to all crimes where the prosecution have to prove fraud. In *The People* v. *Grey* [1944] Ir.R. 326 the Irish Court of Criminal Appeal held that a claim of right was a good defence to a charge of fraudulent conversion. See Edwards, *Mens Rea in Statutory Offences*, Chap. VIII.

MALICIOUS PROSECUTION

Wrongful arrest, false imprisonment and malicious prosecution—malice

Glinski v. McIver

Queen's Bench Division: Cassels J., and a jury. (*The Times*, November 1, 1958.[9])

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[9] For the plaintiff: *W. R. Rees-Davies* and *Paul Sieghart* (instructed by Probyn, Dighton & Parkhouse). For the defendant: *F. H. Lawton, Q.C.*, *W. W. Stabb* and *David Smout* (instructed by The Solicitor for the Commissioner of Police of the Metropolis).

G. sued M., who was a police officer, for wrongful arrest, false imprisonment and malicious prosecution. M. admitted that the arrest had been unlawful. The action for malicious prosecution was in respect of an alleged offence of conspiracy to defraud, brought at M.'s instance against G. G. was subsequently tried for the alleged offence and acquitted.

Cassels J., summing up to the jury, said that malice formed the foundation of an action for malicious prosecution: if M., in prosecuting G., had been actuated by a desire to bring G. to justice or by a desire to perform his duty as efficiently and honestly as he could, there was no malice; but if M. had been actuated by some ulterior motive, there was malice.

The jury found that M. was actuated by malice; that M. did not honestly believe that G. was guilty of the offence of conspiracy to defraud; but that M. had reason to believe that G. might be identified with the person who was said to have been guilty of the offence of conspiracy to defraud.

Cassels J. *held* that there was no reasonable and probable cause for the prosecution, and entered judgment for the plaintiff accordingly. [D. C.]

Commentary. " Malice " in the criminal law usually means merely intention that, or recklessness whether, certain consequences, which are forbidden by the law, should ensue: see *R.* v. *Cunningham* (1957) 41 Cr.App.R. 155; [1957] Crim.L.R. 473. In the tort of malicious prosecution, however, malice bears its more natural meaning of improper purpose; *e.g.*, where a prosecution is brought not simply with the object of bringing a person to justice, but out of spite or ill-will against the plaintiff.

It is for the judge to decide whether there is any evidence of malice; and, if he holds there is, for the jury to say whether the defendant was, in fact, malicious.

RECOGNISANCES

Binding over—return to Nigeria for five years—no power under 1361 Act

R. v. Ayu

Court of Criminal Appeal: Lord Parker C.J., Cassels and Diplock JJ.: November 17, 1958.[10]

A., a native of Lagos, was convicted at a magistrates' court of being found in a dwelling-house for an unlawful purpose and was committed to quarter sessions for sentence as an incorrigible rogue. At quarter sessions A. was sentenced to twelve months' imprisonment and an order was made " that at the end of any imprisonment which he may undergo or at such earlier date as the Home Secretary may direct he is bound over in his own recognisance in the sum of £10 to accompany an escort to the train, boat or aeroplane where he will be sent to Nigeria as soon as arrangements can be made and that he does not land again in this country for a period of five years thereafter. In default of his so entering into such a recognisance he will be imprisoned for six months." The question whether an order could be made imposing a condition of this nature was considered by the Court of Criminal Appeal:

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[10] For the appellant: *M. D. L. Worsley* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *C. J. T. Pensotti* (instructed by the Town Clerk, Brighton).

Held, that an order imposing a condition that a defendant must return to his own country and stay there may be made in the case of an order binding him over to come up for judgment when called upon. Such a condition had been imposed in previous cases approved by this court. It may be that quarter sessions had been misled by the report of the case of *R.* v. *McCartan* [1958] 3 All E.R. 140; [1958] Crim.L.R. 614 in which Lord Goddard quoted the words he had used to the defendant in *R.* v. *Flaherty* [1958] Crim. L.R. 556, namely: " The court is going to bind you over in your own recognisance in the sum of £10 that you accompany an escort to the train where you will be sent to Eire tonight or as soon as arrangements can be made, and you must not land again in this country for at least three years." On the face of that it might be thought that a condition was being inserted in a binding over under the Justice of the Peace Act, 1361, but it was clear from the record that the order had been made after the sentence had been quashed and provided that the defendant should come up for judgment when called upon; it was another way of saying: " You will not be called up for judgment if you go to Eire and reside there for three years without coming back." There was no power to impose such a condition in the case of a binding over under the Act of 1361 so that the order in the present case must be quashed. The sentence of imprisonment would, of course, stand. [H. P.]

Commentary. This case should dispel at least some of the fears entertained by Mr. A. J. Chislett (" Recognisances and Conditions " [1958] Crim.L.R. 734) as a result of the apparently misleading nature of the reported remarks in *R.* v. *McCartan.* It is now made clear that it is not " open for any kind of condition to be inserted according to the whim of the judge or magistrate " in a recognisance to keep the peace or be of good behaviour. It also appears that the court in *McCartan* did not intend to say that a recognisance to keep the peace can be enforced by a sentence of imprisonment; and the law that a breach of recognisance can be enforced only by a forfeiture of the sum in which the recognisor is bound over (though imprisonment may be imposed in default) remains undisturbed.

According to Archbold, p. 252, where a convicted person is bound over to come up for judgment, it is not unusual also to require the prisoner to enter into recognisances to keep the peace and be of good behaviour in the meantime. In *R.* v. *Peel* (1943) 29 Cr.App.R. 73, when the prisoner was convicted of embezzling £5, the court attached a condition to the recognisance requiring him to repay, by weekly instalments, the £70 which he had in fact embezzled. On his failing to pay these instalments he was sentenced to six months' hard labour. The Court of Criminal Appeal, in reducing his sentence, expressed strong disapproval of this procedure, pointing out that it is not the function of the criminal courts to compel people to pay their debts. Surely it is equally not the function of the criminal courts to make what amount almost to deportation orders? If the court has power at common law to make such orders, it is not confined to natives of Eire or Nigeria; there is nothing to stop the court giving any person, convicted of an offence punishable with imprisonment, the option of leaving the country or suffering imprisonment. Should not the conditions which may be imposed, when binding over to come up for judgment, be subject to the same limits as simple common law binding over orders?

SHOPS

Sunday trading—several trades or businesses in one shop—no notice stating purpose for which shop open

Tonkin v. Raven

Queen's Bench Divisional Court: Lord Parker C.J., Streatfeild and Diplock JJ. ([1958] 3 W.L.R. 643.)[11]

Section 47 of the Shops Act, 1950, provides "Every shop shall, save as otherwise provided . . . be closed for the serving of customers on Sunday: . . ." Section 50 of the Act provides: "Where several trades or businesses are carried on in the same shop and any of those trades or businesses consist only of transactions of such nature that, if they were the only transactions carried on in the shop, the provisions of this part of the Act, requiring the shop to be closed for the serving of customers . . .

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[11] For the prosecutor: *Paul Wrightson* (instructed by Sharpe, Pritchard & Co. for R. H. Buckley, Town Clerk, East Ham). The respondent did not appear and was not represented.

on . . . Sunday would not apply to the shop, the shop may be kept open for the whole or any part of Sunday . . . for the purpose of those transactions alone, subject, however, to such conditions as may be prescribed."

R., the shopkeeper of a general store, was charged with an offence under section 50 of the Shops Act, 1950, in that he failed to display a notice, on a Sunday, stating the purpose for which the shop was open. The justices were of the opinion that the charge, as laid under section 50 of the Act, disclosed no offence, and accordingly dismissed the charge. On appeal by the prosecutor, by way of case stated,

Held, dismissing the appeal, that section 50 of the Act created no offence: that section was purely a permissive section providing exemption, in certain circumstances, from the prohibition contained in section 47; section 47 was the governing section which created the offence, and the section under which the information ought to have been laid. [D. C.]

Commentary. *Cf. Waterman* v. *Wallasey Corporation* [1954] 1 W.L.R. 771, where the information was laid under section 47. The purpose of the Act is to protect shop assistants.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Imprisonment

In R. *v*. EVANS the court (Lord Parker C.J., Cassels and Diplock JJ.: November 3, 1958) reduced a sentence of three years' imprisonment to one of eighteen months' imprisonment. E. had been convicted at quarter sessions, with another man, of storebreaking and receiving. E. was a man of thirty-five years of age with no previous convictions. The other man, who had been once previously convicted for breaking into an unoccupied house, had also been sentenced to three years' imprisonment. The court stated that, although this was a bad case, some distinction ought to be drawn between the two sentences and, having regard to E.'s good character, the sentence would be reduced to one of eighteen months' imprisonment.

In R. *v*. MALONE the court (Lord Parker C.J., Cassels and Diplock JJ.: November 10, 1958) reduced a sentence of five years' imprisonment to one of two years' imprisonment. M. had pleaded guilty at quarter sessions to storebreaking. M., who was a man of forty-seven years of age, had sixteen previous convictions, mostly for larceny and false pretences, for which he had been fined or given sentences of imprisonment varying from one to eighteen months. His last conviction was in October, 1948, when he was sentenced to five years' penal servitude for receiving and warehousebreaking. He was released from prison in April, 1952. The present offence was committed when M., with another man, broke into a store by breaking a window, but they left without taking anything and were caught while they were leaving. The court stated that the offence itself, though serious, was not one which in the ordinary way would merit five years' imprisonment and that the court which imposed the sentence must have been largely influenced by M.'s record. But having regard to the nature of the offence and to the fact that M. had apparently run straight for six years, this court would substitute a sentence of two years' imprisonment with an order under section 22 of the Criminal Justice Act, 1948.

In R. *v*. LAYTON the court (Lord Parker C.J., Cassels and Diplock JJ.: November 10, 1958) reduced a sentence of three years' imprisonment to one of thirty months' imprisonment. L. had pleaded guilty at quarter sessions in July, 1957, to housebreaking and had been put on probation for three years. In July, 1958, L. pleaded guilty at the same court to larceny in a dwelling-house and to housebreaking and he was then sentenced to eighteen months' imprisonment for those offences and to three years' imprisonment for the breach of probation, the sentences to run concurrently. L. was a man of thirty-seven years of age and had previous convictions. The court stated that in this case L. had been in prison awaiting trial for four and a half months; that would have been equal to a six months' sentence if he had earned the usual remission. It seemed to this court that three years' imprisonment would have been the proper overall sentence but that the four and a half months should have been taken into account. The sentence would accordingly be reduced to one of thirty months' imprisonment.

Preventive detention

In R. *v.* KAVANAGH, the court (Lord Parker C.J., Streatfeild and Diplock JJ.: October 27, 1958) reduced a sentence of eight years' preventive detention to one of five years' imprisonment. K. had pleaded guilty at a magistrates' court to larceny and had been sentenced by a Crown court. K., who was a man of thirty-six years of age, had numerous previous convictions, mostly for larceny, including eight prison sentences. His last conviction was in January, 1955, for entering a dwelling-house by night with intent, when he was sentenced to five years' imprisonment. The present offence consisted of the larceny of a raincoat and other articles of clothing and a few oddments of the total value of £12, and it was committed within sixteen days of his release from prison. The court stated that, despite K.'s shocking record, the sentence of eight years' preventive detention was perhaps hardly justified when the offence was merely the stealing of a raincoat. It was clear, however, that, unless he pulled himself together, K. would get preventive detention next time. In all the circumstances the court would substitute a sentence of five years' imprisonment.

Corrective training

In R. *v.* EADES, the court (Lord Parker C.J., Cassels and Diplock JJ.: November 3, 1958) reduced a sentence of three years' corrective training to one of eighteen months' imprisonment. E. had pleaded guilty at quarter sessions to shopbreaking. E., who was a man of twenty-six years of age, had nine previous convictions and had been sentenced, *inter alia*, to approved school and to Borstal training. In 1950 he had been convicted of taking and driving away a motor-car and, in the same year, of attempted shopbreaking and possessing housebreaking implements by night. His last conviction was in 1951 when he was sentenced to fourteen days' imprisonment for three shopbreakings. The present offence was committed when he and another man borrowed a van and broke into a shop; and they were caught red-handed carrying £300 worth of property. The court stated that the appellant had apparently run straight for the last seven years and that they felt inclined to take a risk in this case. This man was clearly able to pull himself together if he wanted to and the court thought that this offence might have been a lapse. In those circumstances a sentence of corrective training was not the right sentence in principle and a sentence of eighteen months' imprisonment would, therefore, be substituted for the sentence of corrective training.

Fine

In R. *v.* MILLER AND HANOMAN, LTD. (reported as to appeal against conviction, *ante*, p. 50) the court varied a sentence of eighteen months' imprisonment to a fine of £3,000. M. was a man of thirty-seven years of age with no previous convictions. The court stated that both the trial judge and this court felt that this was a case for imprisonment rather than a fine, but M. was in a serious state of health. It had become clear since the trial that M. was much worse than was thought and was suffering from a succession of heart attacks. This court felt that, notwithstanding the seriousness of the offences, it would be proper to substitute a fine. M. had been in prison for nearly two months and, in all the circumstances, this court would substitute a fine totalling £3,000.

In R. *v.* DERMODY, the court (Lord Parker C.J., Cassels and Diplock JJ.: November 17, 1958) substituted a fine of £240 for a sentence of eighteen months' imprisonment. D. had been convicted at quarter sessions of three offences of larceny. D. was a man of thirty-four years of age with no previous convictions. The present offences were committed when D., with another man, stole a road roller, fourteen lamps and struts and pipes. The other man, who was tried separately, was put on probation. The court stated that these were serious offences and one could not say that the sentence imposed was wrong in principle standing by itself but, having regard to the sentence imposed upon the other man, this court would substitute a fine of £240.

Probation

In R. *v.* Bailey, the court (Lord Parker C.J., Cassels and Diplock JJ.: November 17, 1958) varied a sentence of Borstal training to one of probation. B. had pleaded guilty with two other youths at quarter sessions to housebreaking and larceny. B. was a young man of seventeen years of age with no previous convictions. The court stated that the court which imposed the sentence had desired to send B. to a detention centre but that there had been no room available; the prison commissioners had said that they did not think B. was in need of a prolonged period of training, such as Borstal training; and the probation officer had said that he did not think he could do anything with B. in his present frame of mind. The court had been in a very great difficulty. This court thought that, now B. had been in prison for some eighteen weeks, that might have taught him a lesson and that it would be worth the risk of substituting a probation order for the sentence of Borstal training. Accordingly, this court would make a probation order for twelve months.

In R. *v.* Kempton, the court (Lord Parker C.J., Cassels and Paull JJ.: November 24, 1958) varied a sentence of Borstal training to one of probation. K. had pleaded guilty at a magistrates' court to larceny from the person and had been sentenced by quarter sessions. K., who was a young man of nineteen years of age, had one previous conviction in January, 1957, when he had been sentenced to eight months' imprisonment for malicious wounding and possessing an offensive weapon. The present offence was committed when K., with another youth, asked a boy outside a café for sixpence; when the boy pulled some money out of his pocket (amounting to three shillings) they snatched the money. The court stated that it looked as if K. was a violent type who would find himself in very serious trouble unless he pulled himself together. The larceny was, however, only a matter of three shillings and, quite apart from that, it appeared that the boy concerned was one with whom K. kept company. This court felt that it would be possible now—K. had been in prison for three months—to give him a chance by putting him on probation. Accordingly, this court would make a probation order for three years.

Acts and Orders[*]

Agriculture

See SCOTLAND, p. 67, *post*.

Animals

The Tuberculosis (Attested Herds) Scheme, 1950 (S.I. No. 1126) as amended, is revoked and replaced with amendments, the principal changes being (1) in the event of non-observance of the Scheme by the owner of an Attested or Supervised Herd the amount by which the bonus in respect of that herd may be reduced is now at the discretion of the Minister of Agriculture, Fisheries and Food; (2) provision is made for the fixing by the Minister of a new date from which the bonus period is to be calculated where two Attested or Supervised Herds are combined; and (3) claims for capitation bonus are to be made within three months of the June and December statutory return dates. Notwithstanding the revocation of the 1950 Scheme it is provided that existing Attested Herds and Supervised Herds shall be treated as such for the purposes of the present Scheme, but the period during which bonus is payable in respect of them under this Scheme is reduced by the length of the period during which bonus was payable under the revoked scheme.

It is an offence under section 7 of the Diseases of Animals Act, 1950 (14 Geo. 6, c. 36), for any person knowingly or recklessly to make any false statement for the purpose of obtaining for himself or any other person any sum payable under the provisions of the Scheme. TUBERCULOSIS (ATTESTED HERDS) SCHEME, 1958 (S.I. No. 1912) (6d.).

For penalties for contraventions see section 7 of the Diseases of Animals Act, 1950.

See also SCOTLAND, p. 67, *post*.

Armed Forces

The Naval Discipline Act, 1957 (5 & 6 Eliz. 2, c. 53), is brought into force on January 1, 1959. The main alterations in the law relating to naval discipline which are brought into force with the commencement of this Act are dealt with in [1957] Crim.L.R. at 691, and at 669–671. NAVAL DISCIPLINE ACT, 1957 (COMMENCEMENT) ORDER, 1958 (S.I. No. 1952) (2d.).

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[*] Prepared by F. Maurice Drake, *Barrister-at-Law*.

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 1833 (Camberwell) (2d.); 1834 (Greenwich) (3d.); 1835 (Richmond) (2d.); 1928 (St. Marylebone) (2d.); 1929 (Southwark) (2d.); 1963 (Lambeth) (2d.).

The following Order has been made regulating the maximum weight of vehicles which are permitted to use certain routes: S.I. No. 1847 (Thurrock) (3d.).

A speed limit of 40 m.p.h. is imposed on certain specified lengths of road in the London Traffic Area. Other lengths of road were specified in earlier Regulations (S.I. No. 301) which came into force on March 15, 1958. Operative November 22, 1958. LONDON TRAFFIC (40 M.P.H. SPEED LIMIT) (NO. 2) REGULATIONS, 1958 (S.I. No. 1880) (3d.).

For penalties for contraventions see section 10 of the Road Traffic Act, 1930, as amended by section 2 (2) of the Road Traffic Act, 1934.

Medicine

Certain provisions of the Opticians Act, 1958 (6 & 7 Eliz. 2, c. 32) (see [1958] Crim.L.R. 631), are brought into operation on January 1, 1959. The provisions concerned are sections 1, 5, 8, 17–19, 25–31, parts of section 7 and the Schedule, and include, in particular, provisions with regard to the establishment and constitution of a General Optical Council and provisions enabling the Council to make rules and to establish certain committees. OPTICIANS ACT, 1958 (COMMENCEMENT NO. 1) ORDER, 1958 (S.I. No. 1954) (2d.).

Merchant Shipping

Ghana has acceded to the Load Line Convention and has accepted the Safety Convention. Operative December 2, 1958. MERCHANT SHIPPING (LOAD LINE CONVENTION) (SAFETY CONVENTION) (GHANA) ORDERS, 1958. (S.I. NOS. 1959, 1960) (2d. each).

Official Secrets

The Atomic Weapons Research Establishment, Ha Ha Road, Woolwich Common, London, S.E. 18, is declared a prohibited place for the purposes of the Official Secrets Act, 1911. Operative December 1, 1958. Official Secrets (Prohibited Place) Order, 1958. (S.I. No. 1935) (2d.).

Pests

Growers of fruit or other trees in England and Wales which are infected with fire blight disease are required to notify the Ministry of Agriculture of the fact. Authorised officers of the Ministry may by notice require occupiers of land on which trees infected or suspected of being infected with fire blight disease are present to grub up and burn any trees or parts of trees and to take other steps to prevent the spread of the disease. These officers may also enter land or premises and carry out such measures if the occupier fails to do so, and may inspect and take samples from trees. The requirements of the Order may be relaxed for scientific or research purposes under licence from the Minister. Operative November 6, 1958. Fire Blight Disease Order, 1958 (S.I. No. 1814) (3d.).

For penalties for contravention see paragraph 8 of the Order.

Police

The Police Regulations, 1952 (S.I. No. 1704), are amended. Regulations 1 and 3 provide for increased scales of pay for inspectors, sergeants and constables. Special provision is made in Regulation 1 regarding the increments of sergeants who were promoted to that rank on or after April 23, 1955, and before April 22, 1958. Regulation 2 provides for increased rates of detective duty allowance. Operative April 22, 1958. Police Regulations, 1958 (S.I. No. 1882) (3d.).

Public Health

See Scotland, *post.*

Scotland

The Agriculture Act, 1958, provides that certain of its provisions hall come into operation on the appointed day, and this has now een fixed, in relation to Scotland, as November 1, 1958. All the emaining provisions of the Act came into force on the day on vhich it received the Royal Assent, namely August 1, 1958. GRICULTURE Act, 1958 (Appointed Day) (Scotland) Order, 958. (S.I. No. 1705) (2d.).

The remaining provisions of the Clean Air Act, 1956 (4 & 5

Eliz. 2, c. 52), are brought into operation in Scotland on December 31, 1958, the earlier provisions having been brought into operation in Scotland by the earlier Order (S.I. 1956 No. 2026). The provisions which now come into force include those relating to the emission of dark smoke from chimneys, railway engines, and vessels, grit and dust from furnaces, smoke nuisances, Crown premises and vessels owned by the Crown. CLEAN AIR ACT, 1956 (APPOINTED DAY NO. 2) (SCOTLAND) ORDER, 1958. (S.I. No. 1931) (2d.).

For penalties for contraventions see section 27 of the Clean Air Act, 1956.

Section 1 of the Clean Air Act, 1956, which is brought into operation in Scotland on December 31, 1958 (see above), makes it an offence to emit dark smoke, as defined in the Act, from the chimney of a building, or of certain boilers or industrial plant, but provides that emissions of smoke lasting for not longer than such periods as may be specified by the Secretary of State by Regulations shall, in such classes of cases and subject to such limitations as may be so specified, be left out of account for the purposes of the section. These Regulations specify the permitted emission of smoke from such chimneys. Operative December 31, 1958. DARK SMOKE (PERMITTED PERIODS) (SCOTLAND) REGULATIONS, 1958. (S.I. No. 1933) (3d.).

The discharge of certain noxious or offensive gases, and of smoke, grit and dust from certain types of works is subject to control under the Alkali, &c., Works Regulation Act, 1906 (6 Edw. 7, c. 14), as extended by virtue of section 17 of the Clean Air Act, 1956. The lists of these gases and works are now amended and extended. Operative December 31, 1958. ALKALI, &C., WORKS (SCOTLAND) ORDER, 1958 (S.I. No. 1932) (3d.).

For penalties for contraventions see sections 1–7 inclusive of the Alkali, &c., Works Regulation Act, 1906.

The use of unapproved traps for the purpose of killing or taking any wild animals is prohibited as from May 1, 1959, except for the purpose of killing foxes or otters and except in the cases of certain traps which are specified by the Secretary of State as being adapted solely for the destruction of rats, mice or other small ground vermin (see below). The Agriculture (Spring Traps) (Scotland) Order, 1954 (S.I. No. 1587), which permitted the use of unapproved traps for the purpose of killing any wild animals, is revoked. AGRICULTURE (SPRING TRAPS) (SCOTLAND) ORDER, 1958 (S.I. No. 1778) (3d.); the traps which are approved by the Secretary of State for use for the purpose of killing or taking animals other than foxes or otters are specified in the Schedule to the SPRING TRAPS APPROVAL (SCOTLAND) ORDER, 1958 (S.I. No. 1780) (3d.); the two types of traps specified by the Secretary of State as being adapted solely for the destruction of rats, mice and other small ground vermin are set out in the Schedule to the SMALL GROUND VERMIN TRAPS (SCOTLAND) ORDER, 1958 (S.I. No. 1779) (3d.). These three Orders are all operative May 1, 1959.

For penalties for contravention see section 50 of the Agriculture (Scotland) Act, 1948 (as amended by section 10 of the Pests Act, 1954).

Sea Fisheries

There is to be no close season for grey seals in the Farne Islands during the period of twelve months after November 17, 1958. During that period the killing of grey seals in the Farne Islands is prohibited except by persons holding permits granted by the Minister of Agriculture, Fisheries and Food. The conditions of these permits and the means by which the grey seals may be killed are specified in the Schedule. The Grey Seals Protection Act, 1932 (22 & 23 Geo. 5, c. 23), which establishes an annual close season for grey seals is modified accordingly by this Order, which is made under the provisions of section 1 of that Act. Operative November 17, 1958. GREY SEALS PROTECTION (FARNE ISLANDS) (SUSPENSION OF CLOSE SEASON) ORDER, 1958. (S.I. No. 1895) (3d.).

For penalties for contraventions see section 2 of the Grey Seals Protection Act, 1932.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of readers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

52. *Incorrigible rogue—proving convictions*

In September, 1954, W. was convicted at a magistrates' court of indecently exposing his person with intent to insult a female, contrary to section 4 of the Vagrancy Act, 1824, and was sentenced to two months' imprisonment. He thus came within the category of a "rogue and vagabond."

In January, 1958, W. was again convicted at a magistrates' court of a similar offence and after proof had been given of his earlier conviction, he was adjudged to be an " incorrigible rogue " and was committed to quarter sessions where he was sentenced to nine months' imprisonment.

Should W. again be convicted of a similar offence will it be necessary in your view to prove again the conviction of September, 1954, or do you consider that proof of the conviction in January, 1958, as an " incorrigible rogue " will enable the justices to adjudge the prisoner an " incorrigible rogue " in the new proceedings with a view to his committal to quarter sessions for sentence.

Section 5 of the Vagrancy Act, 1824, provides that, " Every person committing any offence against this Act which shall subject him . . . to be dealt with as a ' rogue and vagabond,' such person having been at some former time adjudged so to be and duly convicted thereof . . . shall be deemed an ' incorrigible rogue.' "

It is clearly desirable that, if possible, the most recent previous conviction should be proved and the question which has been asked is whether a conviction as an " incorrigible rogue " is prima facie evidence that the accused has at some former time been adjudged a " rogue and vagabond " bearing in mind that there is no provision in the Vagrancy Act comparable to section 23 (2) of the Criminal Justice Act, 1948. Alternatively should the conviction as a " rogue and vagabond " in September, 1954, be used in subsequent proceedings against W.? [J. T.]

Answer

Using a conviction as an incorrigible rogue to establish a previous conviction as a rogue and vagabond is an indirect method of proof. In view of the terms of the Act, admittedly the required inference must be drawn; but it would seem better to prove the previous conviction as a rogue and vagabond by direct means—namely, production of a certified extract from the magistrates' court register. The 1954 conviction could be used in this way; alternatively the 1958 conviction could be proved. The fact that there was no sentence as a rogue and vagabond in 1958 does not disqualify it as a previous conviction of that nature. [A. E. J.]

Letters to the Editor

The Outlook for a Devil in the Colonies

Sir,

I have read with considerable interest the article entitled "The Outlook for a Devil in the Colonies" contained in your issue for October, 1958. In one respect, however, in considering the defence of mistake based upon an honest belief in the supernatural, Mr. Justin Lewis appears to take a view which is inconsistent with some leading decisions of the local courts in Africa.

I refer, in particular, to the decision of the Federal Supreme Court in *Att.-Gen. for Nyasaland* v. *Jackson* (1957) R. & N.L.R. 443, where an African who honestly believed his life to be in danger by reason of a curse pronounced by a woman, killed her and pleaded self-defence when tried for murder. Held, on appeal, that a belief in the efficacy of witchcraft was not a reasonable belief which the law would recognise as a basis of a defence of justifiable homicide. It will also be noted that, in accordance with the terms of the Penal Code, this question fell to be decided by the principles of English common law.

I refer also to the decision of the East African Court of Appeal in *Erika Gaikuwa*, 18 E.A.L.R. 175, where the dictum was quoted with approval that a belief in witchcraft *per se* does not constitute a circumstance of excuse or mitigation for killing a person believed to be a witch or wizard when there is no immediate provocative act.

In the light of these authorities it is difficult to see how a man who kills another, thinking he is an evil spirit, can hope successfully to plead mistake in his defence. However honestly he may believe that his victim is an evil spirit, such a mistake cannot, without something more, be held in law to be a reasonable one. That "something more" must amount to grounds which might lead any reasonable man to make the same mistake.

Yours faithfully,

G. Collett.

Zomba, Nyasaland.

[*Mr. Lewis writes*: "There are several appeals decided by the East African Court of Appeal, such as the above quoted by your correspondent, which decide that if the facts establish that the deceased was performing some act in the presence of the accused which he believed and an ordinary person of his community would genuinely believe was an act of witchcraft against him and the accused was so angered as to be deprived of his self-control, the defence of provocation is open to the accused.

"The accused in these cases do not allege that the witch-doctor or wizard concerned was a supernatural being or a non-human being. They allege that a human being was a wizard. This is not sufficient to support the defence of mistake. These cases make no difference to the argument put forward in my article.

"I am afraid that the Nyasaland report mentioned is not available in the Colony of Fiji and I can make no comments thereon."]

Books and Periodicals

Book Reviews:

Suspect Documents: Their Scientific Examination. By Wilson R. Harrison, PH.D., M.SC. London: Sweet & Maxwell, Ltd. 1958. 533 and (glossary and index) 50 pp. (£4 4s. net.)

A considerable amount of document examination is undertaken by the Identification Bureau, City of Glasgow Police, for Forces throughout Scotland. The endeavour has always been to raise the standard of the document examiner, particularly the handwriting expert, to a position where the courts recognise the proof submitted as scientific proof. That such endeavours have been successful is shown from the following quotes from the opinions of the two judges in an appeal to the High Court in Scotland against a conviction. At the trial itself the evidence of the handwriting experts was one of the major points of evidence against the accused and in dealing with the proof of handwriting at the trial the appeal judges, among other things, said the following:

> (1) " Mr. . . .'s chief point in this appeal is that the crucial link in the Crown proof is the evidence incriminating. . . . He says that where the evidence against an accused is handwriting evidence given by experts, in view of the nature and character of such evidence it can never, however convincing, be enough by itself to convict an accused person. Well I doubt very much whether that is a sound proposition under modern conditions. No doubt, as the textbooks show, in the old days handwriting evidence by experts, or so called experts, was regarded with a measure of suspicion, and rightly so because it was usually given by lithographers and tradesmen of various sorts with no kind of scientific training. But nowadays times have changed and the study of handwriting has become a very highly scientific affair which is carried out with elaborate equipment by people who are specially trained. . . ."
>
> (2) ". . . I wish, however, to add that, as at present advised, I am not prepared to affirm the statement which appears in some of the text writers that evidence derived from a comparison of a questioned document with what is undoubtedly the handwriting of the accused is of little value and cannot by itself justify a conviction. Such statements in my experience are not in conformity with modern practice, a fact which is probably accounted for by the matter to which your Lordship has referred, namely, the progress that has been made in the science of the comparison of handwriting in the 100 years which have elapsed since Mr. Dickson wrote his book on evidence. . . ."

The above exemplifies the surprising change in the attitude of judges, lawyers and police to document examiners over the last twenty years. The previous scorn with which such evidence was considered was perhaps not surprising considering the conflicts of opinion that arose in nearly every document case between the alleged " handwriting experts."

Since document examinations passed into the hands of the Forensic Science Laboratories it has become virtually a true science and no one has done more to raise the status of the document examiner than the author of this book, Dr. Wilson R. Harrison.

Dr. Harrison, as Director of the Home Office Forensic Science Laboratory at Cardiff, has gained experience in the examination of documents beyond the scope of any other person in this country and in *Suspect Documents* has passed on to experts and to the general public, without reservation, the results of his researches and also the mass of information which he has gained from his examination of some 7,000 document cases.

All branches of document examination are covered in the book and the chapters on Laboratory Equipment and Photography describe the latest types of equipment now available to aid the examiner in his search for the truth.

The scope of the work is so wide that the wealth of information given cannot possibly be assimilated at one reading. The facts given are most accurate and because they are given in such detail the book will be of great value as a reference for anyone who is confronted by a document problem. The bibliography at the end of each chapter adds greatly to its value as a work of reference. The task of finding the relevant information is made easy by the provision of a well compiled and complete index.

The author, whose ability as an expert and a writer is well known to fellow document examiners, makes every shade of his meaning clear even to the extent of providing a glossary for the benefit of the non-expert reader. He has thus produced that rarity in British forensic science literature, a book of value both to the expert and to the layman.

Encouragement to the continued study of this fascinating subject is given in the excellent "Suggestions for Further Reading" on pages 532–533.

Dr. Harrison's detailed advice and instructions to the investigating officer on the many aspects of a case involving documents and the lengthy chapter on the court aspects of a document case should recommend this book both to police officers and lawyers. In this reference, Dr. Harrison is also to be congratulated on the excellence of Chapter 13, which deals with "The Care, Preservation and Cleaning of Documents."

The publishers are undoubtedly to be congratulated on producing such a handsomely bound book, clearly printed on good paper and profusely illustrated, very important items that are so often overlooked in the production of alleged textbooks.

British experts can now be proud that Dr. Harrison has written a book which is fit to take its place in the world literature on this subject of suspect documents alongside Osborne's *Questioned Documents* which, until now, was the most authoritative textbook available.

GEORGE MACLEAN.

Coroner's Practice. By Gavin Thurston. London: Butterworth & Co. 1958. 171 and (index) 9 pp. (21s. net.)

This book deals competently with the practical medical and technical problems which form the greater part of the coroner's work. The chapters on accidental death and suicide are valuable contributions to the scanty literature on these subjects, and can be recommended to coroners and others interested in the problems concerned. The section dealing with road accidents is particularly valuable.

Unfortunately it is not possible to be so laudatory of the author's handling of the legal principles underlying the investigation of coroners' cases. In giving full expression to his entirely worthy views on the reforms necessary for the improvement of our medico-legal investigative system, the author often fails to distinguish the existing law. Such presentation is stimulating to a reader with a comprehensive knowledge of the subject, but it cannot be assumed that all readers of works on procedure are so happily endowed, particularly when the field of law is so specialised as that dealt with in this book. In common with most other works on medico-legal subjects, reference to legal authority is often slovenly and sometimes incorrect. Most cases are given with no reference to an official report, and this is particularly confusing where the case is misspelt, as on page 69 where the reader is referred to *Re Hill* (1882) for a principle which is found in *Re Hull* (1882) 9 Q.B.D. 689, at p. 692, and is based on an authority no less remote than Staunforde's *Plees del corone*. Regulations in Statutory Instruments should not be referred to as paragraphs.

Having digested the author's criticisms, on the first page, of coroners who dispose of cases without post-mortem, and careless certification of death by doctors amounting to " guess-work," it is a little difficult to accept the assurance given at the end of the first chapter that " very few murders in this country pass undetected." As the author himself points out " But how can anyone be sure that a death is natural if he is not sure of its cause? " The author admits the utility of the public inquest in dispelling rumours arising out of unexpected death, and one would have expected that this might apply especially to those cases, by no means rare, where the medical evidence, after post-mortem, is unable to determine the exact cause of death and can only exclude " unnatural " cause. In these cases the verdict of a coroner's jury that it is satisfied on the medical evidence may be particularly helpful. It is, therefore, disconcerting to read on the next page that " perhaps the coroner's jury could be dispensed with altogether. The jury is rarely, if ever, required to make a genuine decision, as the facts normally speak for themselves, and there is no power to inflict punishment." It is more than a little unfair to criticise a passage in the Coroners' Society's *Recommendations on Procedure* of 1953 (permission to reproduce having been acknowledged in the Preface) on the ground that it is (in the author's view) inconsistent with a provision of the Mines and Quarries Act of 1954. The author points out (" with respect ") that section 118 of the Act makes deaths from pneumoconiosis notifiable to the district inspector and that the recommendations are, therefore, wrong in stating that a jury is not necessary in those cases. In point of fact, all section 118 does is to empower the Minister to make such deaths notifiable, and, as he has not yet done so, the recommendations are still correct, and it is the author who is in error. The law relating to the *mens rea* of manslaughter is extremely badly put, and it is interesting to note that the author thinks that " the conception of criminal negligence " is " easily comprehended by lawyers." More space might have been given to consideration of stillbirths (threequarters of a page) and barbiturate poisoning (one paragraph).

J. D. J. H.

The Assize and Quarter Sessions Handbook. By Cyril E. S. Horsford, M.A. London: Sweet & Maxwell, Ltd. 1958. 129 pp. (17s. 6d. net.)

Knowing that Mr. Horsford "served his apprenticeship" at the Central Criminal Court before going to the County of London Sessions one can confidently expect to find accurate guidance in practice at those courts which try indictable offences and hear appeals from magistrates' courts. The original work by Linton Thorp and Raymond E. Negus dealt only with quarter sessions, the present author aiming at a wider field has undertaken to deal also with assizes but apparently, at times, has allowed his attention to stray from this target. This ABC is advertised as a compact guide book for all barristers and solicitors who have cases at assizes and quarter sessions, as terse as possible, containing the pith of criminal law and procedure, ideal for use as either a desk book or court book as necessary; taking into consideration its size, which allows it to be slipped into a pocket or hand-bag, it merits this description and even offers advice to presiding judges and chairmen.

The common law right to state a case, if still deserving mention in a book of this size, requires reference to the Crown Cases Act, 1848, and the present-day treatment of a case stated as an appeal under the Criminal Appeal Act, 1907. The reference, at page 15, to section 108 of the Magistrates' Courts Act, 1952, warrants a note of subsection (3) of that section. At pages 57 and 64–65 *Warren and Fraser* deserves mention. *R.* v. *Tomlin* is noted under Fraudulent Conversion but not under Embezzlement. At page 78 the explanation of disease of the mind in *R.* v. *Kemp* [1957] 1 Q.B. 399, might usefully be noticed and so, as the book is intended to cover practice at assizes, might *R.* v. *Spriggs* [1958] 1 Q.B. 270. The clerk of the court might be warned at page 86 of the pitfall in subsection (2) (*a*) and (*b*) of section 4 of the C.J.A., 1948. At page 90 the effect of *R.* v. *Nicholson* (1947) 32 Cr.App.R. 98, on *R.* v. *McMinn* should have been noticed.

The above points do not seriously detract from the value of this work to anyone requiring an elementary book of reference capable of recalling to the mind something which, although on the tip of the tongue, evades definition. On the other hand, the hesitant purchaser might well be deterred from spending as much as 17s. 6d. should his eye, while running over the pages, happen on such things as a reference to corporal punishment, at page 45, the note following the proviso to condition 3 on page 56 (which does not appear to have any bearing on depositions unless it is intended to be a warning that an unexpected plea of not guilty does not permit the reading to the jury of the depositions of the witnesses who have not been warned to attend), the note following "3. Presumptions" on page 60 (which has possibly slipped half-way down the page from immediately before "and see Dunbar") and the classification, at page 97, of the question of admissibility of evidence as one of procedure.

C. B. O.

Books Received:

King Mob. By Christopher Hibbert. London: Longmans, Green & Co. 1958. 172 and (biblio. and index) 12 pp. (21s. net.)

The Motor Guide to the Law. By A Barrister. London: Temple Press. 1958. 111 and (index) 4 pp. (10s. 6d. net.)

The Probation Service. Edited by Joan F. S. King, B.A., on behalf of the National Association of Probation Officers. London: Butterworth & Co. 1958. 236 and (index) 4 pp. (25s. net.)

The Society of Captives. By Gresham M. Sykes. Princeton: University Press; London: Oxford University Press. 1958. 144 pp. (30s. net.)

Theoretical Criminology. By George B. Vold. New York: Oxford University Press. 1958. 315 and (biblio. and index) 17 pp. (40s. net.)

Prisons. By B. K. Bhattacharya, M.A., LL.B.(Cal.), PH.D.(Lond.) Calcutta: S. C. Saukar & Sons Private, Ltd. 1958. 187 and (index) 9 pp.

Readers' Digest:

Aiding and abetting: A question of knowledge and intent: 226 *Law Times* 260.

Fraud: The definition of fraud: 108 *Law Journal* 708.

Obscene publications: 122 *Justice of the Peace* 715, 730, 748, 766.

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Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review*, 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

THE

CRIMINAL LAW

REVIEW

February 1959

Expediting criminal trials

During recent months the problem of delay in the hearing of criminal cases, especially in the magistrates' courts, has been the subject of much public discussion.

Much of the criticism of the present system is directed at the hearing of preliminary proceedings in magistrates' courts. The Report of the Departmental Committee on Proceedings before Examining Justices [1] turned a spotlight on these proceedings, their purpose and the advantages of the system. But the recommendations of the Tucker Committee on the question of publicity also led many people to question whether such proceedings are necessary at all.[2]

In this issue we publish an article by Dr. Glanville Williams containing some " Proposals to Expedite Criminal Trials." In this article Dr. Williams considers the arguments for and against the practice of holding a preliminary inquiry in a magistrates' court and the lengthy procedure of taking depositions at such inquiries, and recommends, very strongly, that this procedure be abandoned.

In our view, one of Dr. Williams' most valid arguments against the practice of holding preliminary inquiries lies in the paragraph at page 84 where he cites the proposition of the Tucker Committee that only between 3 and 4 per cent. of offenders are discharged by examining magistrates: the rest are committed for trial. The real filtering is, Dr. Williams states, done by the police. This last statement is supported by implication by Sir Carleton Allen in his article on the Tucker Report where he states that the preliminary hearing is a legacy of the days before the establishment of a professional police force, a C.I.D., and a Director of Public Prosecutions.[3]

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[1] Cmnd. 479.

[2] See, for example, the article by Sir Carleton Allen, Q.C., D.C.L., J.P., at [1958] Crim.L.R. 647, and the correspondence in *The Times* begun on December 15, 1958, by Mr. Christopher Shawcross, Q.C.

While the filtering done by the police prima facie suggests that committal proceedings are, in most cases, unnecessary, it is suggested that the task should not be left entirely to the police without further safeguard; at present a great many police prosecutions are brought without any advice or assistance from qualified lawyers, as few local authorities are willing to pay for the services of a "prosecuting solicitor."

The pre-trial procedure in Scotland, which Dr. Williams considers, and which is recommended by many people with practical experience in this field as being quicker, simpler, and cheaper than the English system, places the decision to prosecute in the hands of the law officers, the Lord Advocate or, in minor cases, the procurator fiscal in each district. The adoption of a similar system might do much to relieve the congestion in the magistrates' courts. It might also relieve pressure on the police, who have not benefited as much as was hoped from the provisions of the Magistrates' Courts Act, 1957.

Another proposal which has been mooted in the press is the setting up of separate courts to deal with minor traffic offences. *Criminal Statistics, England and Wales, 1957*[4] reveal that the total number of persons found guilty of offences of all kinds in 1957 was 864,475: of these 497,294 were found guilty of traffic offences dealt with summarily, that is, 57·5 per cent. of the total. This figure does not include cases committed for trial on indictment, or charges which were dismissed by the courts. It does, however, include offences, such as dangerous driving, driving under the influence of drink or drugs, taking and driving away a motor-car without the owner's consent, which, even if separate traffic courts were established, would probably, by reason of their serious nature, remain within the jurisdiction of the ordinary criminal courts. These offences, however, make up rather less than half the total given above.[5]

This being so, there seems to be a prima facie case for relieving the magistrates' courts of the burden of dealing with these offences. It would enable the courts to get on with the trial of more serious offences and would, in all probability, enable the traffic offences themselves to be more promptly dealt with.

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[3] See [1958] Crim.L.R. 652.

[4] Cmnd. 529.

[5] For detailed statistics of offences relating to motor-vehicles in 1957 including alleged offences in respect of which written warnings were issued by the police, see House of Commons Papers, No. 24, published by H.M.S.O. (2s. 6d.).

LAW REVIEW 1959 pp 79

Detained for questioning

Recently, *The Times*[6] reported that some youths had been detained at a London Police station for more than 24 hours while police officers questioned them about the stabbing of P.C. Summers in North London.

Detentions such as this always raise queries about police powers. And of course such queries are perfectly proper and justified. The police in this country can only work within the limits of the general law they are enforcing. Not for them the complex examination procedures of France, for example. What powers have they, then, to deprive a fellow citizen of his liberty on suspicion of having committed a crime, and how long can they properly detain him?

Since the constable is largely the creature of the common law, one may reasonably seek an answer in the constable's common law right (and duty) to arrest any person whom he reasonably suspects of having committed a felony, whether or not a felony has in fact been committed. This right is followed, so to speak, by the corresponding duty to bring the arrested person before the court if there is sufficient evidence to justify a charge, or to release him if there is not. But between the arrest and the charge (or the release) the law must clearly imply a process of inquiry and questioning, if it is not to be a dead letter.

But though detention for questioning thus appears to be part of the common law, the question of the length of the detention is still unanswered. Perhaps the law regards the remedies provided in tort and *habeas corpus* as setting limits enough to excessive zeal on the part of the police. A detention would be justifiable just so long as it was reasonable, in all the circumstances of the case. If it were not so justifiable, then the constable would have to face the consequences.

Such a view fits in with the rather scanty statutory comment on this subject. For instance, the Magistrates' Courts Act of 1952[7] provides that where a person is arrested without warrant for an offence, and the inquiries cannot be completed forthwith, he may be bailed to return to the police station later. The implication is that there is a discretion, and that he may equally well be detained, while inquiries are being made. Even when the Act goes on to say that a person arrested for an offence without warrant must be brought before the court, it says that this must be done as soon as practicable.

And so the law seems to leave the question of how long a

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[6] *The Times*, December 18, 1958.

[7] Section 38, Magistrates' Courts Act, 1952.

suspect may be detained for questioning unanswered, excepting in terms of what is reasonable and practicable. This is, after all, just what one would expect and hope. After all, the object of the criminal law is to protect the public, not to hamper artificially the bona fide efforts of police officers to enforce it. Many police officers will recall cases in which the suspect has spent a good deal longer in being questioned than the Islington youths. It would be impossible to list all the factors which must influence the mind of an officer in charge of an investigation when he is deciding how much longer he ought to keep a suspect in custody; they are numerous, and will vary from case to case. But such an officer may well reflect that a given period of detention is more likely to be regarded as reasonable if the suspect is guilty than if he is innocent. [C. W.]

Institute of Criminology

Cambridge University General Board has reported that the Faculty Board of Law is to assume initial responsibility for the proposed Institute of Criminology.[8]

The senior staff will be limited in the first instance to a director and deputy-director and three or four assistant directors of research. The Department of Criminal Science will be merged with the Institute.

The Director, Dr. Leon Radzinowicz, has been granted leave of absence to visit American and Continental institutes of criminology. Heads of other faculties with interests in the subject are being consulted.

Parliament

In a short debate in the House of Lords a certain amount of disquiet in respect of the administration of provincial police forces was expressed.[9]

In particular, it was suggested that an inquiry should be made into the functioning of the Home Office Inspectorate of Constabulary, it being felt that their number was too small and their visits to each force too formal, short and far between.

Central Criminal Court and London Sessions

The Attorney-General has made the following appointments at the Central Criminal Court:

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[8] See [1958] Crim.L.R. 568.

[9] H.L. Debates, Vol. 213, cols. 4 *et seq.*, December 8, 1958.

Mr. M. J. H. Turner to be Second Senior Prosecuting Counsel to the Crown;

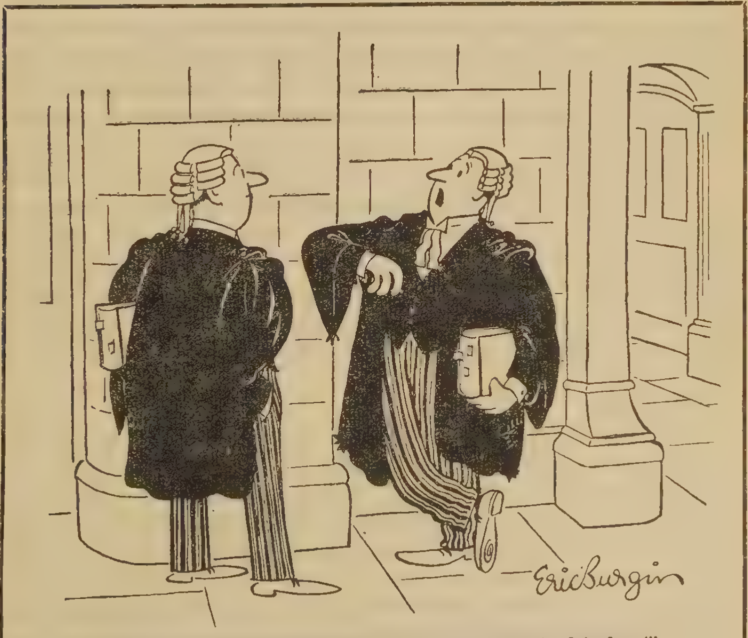
Mr. J. M. G. Griffith-Jones to be Third Senior Prosecuting Counsel;

Mr. E. J. P. Cussen to be First Junior Prosecuting Counsel;

Mr. J. H. Buzzard to be Second Junior Prosecuting Counsel;

Mr. S. A. Morton to be Third Junior Prosecuting Counsel.

The Attorney-General has also appointed Mr. J. C. Phipps to be Prosecuting Counsel to the Crown at the North London Sessions in succession to Mr. S. A. Morton. Mr. Phipps retains his appointment as Junior Counsel to the Crown in appeals from Metropolitan Magistrates to London Sessions.



"I'm beginning to discover that crime doesn't pay on either side of the fence!"

Proposals to Expedite Criminal Trials

By GLANVILLE WILLIAMS, LL.D., *Barrister-at-Law*

It should be a truism that the best evidence is the freshest evidence. Everyone knows that memory fades with time, and this is particularly true in childhood and in middle and old age. Yet consider how we treat the evidence in a criminal case.

The witness's proof of evidence

A prosecution witness's evidence of an occurrence is first given to the police, or the solicitor for the police, and reduced to the form of a "proof." This statement, which is likely to be a more reliable recollection than any of the witness's later statements, is hardly noticed by the law; and no copy of it can be obtained by the defendant. It is true that if the defendant does come to know of the contents of the statement, he can (in England) use it to contradict what the witness says in court; yet the statement is still not positive evidence of the facts stated. In Scotland the precognition taken by the police or the Procurator Fiscal cannot be used in court even for the purpose of showing that the witness has changed his story.[1]

Practice has created two exceptions to the rule that the police will not furnish to the defendant copies of unsworn evidence in their possession. The first relates to reports from the forensic science laboratories. If by some mischance such a report is not supplied to the defence before the trial, the omission will invite severe comment from the presiding judge.[2] The second exception relates to evidence of insanity by prison medical officers.[3]

The deposition

The next statement made by the witness is that taken at the committal proceedings where the trial is to be on indictment. It often happens that the witness fails to "come up to his proof," because he has now forgotten what happened. One can understand the frustration felt by the police when this occurs: perhaps the witness, an old lady, was perfectly clear when her statement was first taken, but she now fails to recall an essential item, and so the case breaks down.

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[1] See the cases noted in [1958] Crim.L.R. 133, 326, 387; also Renton and Brown, *Criminal Procedure*, 3rd ed., 52.

[2] See, *e.g.*, the remarks of Salmon J. reported in *The Times*, November 15, 1957.

[3] See Archbold, § 30.

In so far as the witness remembers, his memory may be to some extent a memory of what he said before rather than a memory of the actual event; and errors and uncertainties may creep in. Thus the deposition taken before magistrates is often not so reliable a record as the witness's original statement; but still it is closer to the event than the evidence that the witness will later give in court. It seems extraordinary, in these circumstances, that the depositions taken before magistrates at enormous trouble are generally not legal evidence in the case. A deposition can be used to contradict the witness if he afterwards embroiders his earlier version or says the opposite, but in legal theory the contradiction merely nullifies the evidence of the particular witness and does not establish the truth.

The witness's third statement is at the trial itself. This, which is the farthest removed in point of time from the occurrence, is regarded with veneration as the authentic evidence in the case. The veneration arises merely because the statement is given on oath and in the presence of judge and jury, and is subject to cross-examination. I do not wish to belittle the importance of cross-examination to detect errors of observation and inference, lapses of memory and deliberate falsifications. But we could retain the advantages of cross-examination while taking more energetic steps than we do now to preserve evidence while it is fresh.

Suggestions for expediting trials

What can be done to improve matters? In view of the fragility of memory it is essential that the trial should follow as quickly as possible the occurrence in question. As compared with Continental practice English procedure is commendably swift. But the question is whether we could not make it even swifter. Where the trial is a summary one, there is no legal obstacle to prevent speedy trial; the problem is largely administrative. Owing to shortage of staff and pressure of work in the clerk's office, as much as a week may be wasted while a summons is being issued, and then a date for hearing must be fixed which will suit the members of the Bench. Many areas lack a Bench in continuous session: this is part of the price that we pay for amateur justice. A third source of delay in summary proceedings is the readiness with which the Bench grants an adjournment at the request of the defence. Although it is clearly right that the defence should be given time to prepare its case, the interests of justice require that the prosecution's story should be heard as soon as possible, and this would seem to suggest that difficulty in putting together the evidence for the defence should not induce magistrates to postpone the taking of the evidence for the prosecution. In other words, the case should be heard in part, and adjourned only after the case for the prosecution has been concluded. But here, again, the system of lay magistrates rather stands in the way, because it is often difficult to secure that the Bench will be constituted in the same way at the adjourned hearing. Another consideration, deserving of weight though not necessarily decisive, is that piecemeal hearing adds to the costs that the defendant will have to bear.

Turning to trial by jury, careful consideration should be given to the delay that now occurs between the time when the case for the prosecution has been fully prepared and the time of trial. This delay is in three stages. (1) The time elapsing before the examining magistrates can hold the preliminary proceedings, for the purpose of taking depositions, fixing the place of trial, etc. (2) The time spent in taking the depositions at the preliminary hearing. (3) The period between committal and trial. The delay under (1) occurs partly because magistrates are overworked, and this is itself due in part to the length of time necessary to take depositions in criminal cases. It is evident, therefore, that the trial would be considerably accelerated if the law were changed to dispense with the need to take depositions. As an experimental reform, it might be provided that the taking of depositions should be dispensed with unless demanded by either the prosecution or the defence. What are the arguments for and against this change?

Reasons for the preliminary inquiry

In the early nineteenth century the preliminary inquiry conducted by examining magistrates was conceived as a safeguard for the innocent; but at the present day it has virtually ceased to perform this function. As a practical matter, the question of committal for trial is rarely argued at the hearing; it is taken for granted. The position is summarised by the Tucker Committee in the proposition that only between 3 and 4 per cent. of offenders are discharged by the examining magistrates; the rest are committed for trial.[4] This is primarily because prosecutions are generally brought by the police, who rarely make a charge unless they have a prima facie case. In other words, the real filtering is now done by the police. Even where the charge is brought by a private prosecutor, he is unlikely to go to the trouble and expense of acting unless he has reasonable evidence.

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[4] See Report of the Departmental Committee on Proceedings before Examining Magistrates, Cmnd. 479 of 1958, para. 7.

A second reason why committals for trial are almost a matter of course is that the defendant rarely makes a serious effort to resist a committal, except perhaps by cross-examining the witnesses for the prosecution. He reserves his own defence, partly because if he produced it at this stage the effect would be to protract the proceedings, making them perhaps as long as the trial itself. Partly, also, his motive, if he is really guilty, is to embarrass the prosecution as much as possible by concealing his defence till half way through the trial itself. An innocent person will generally have stated his defence at the earliest possible moment, and if it appears a reasonable one he will very likely not have been prosecuted at all.

There is at least one case where the magistrates are not allowed to consider the accused's defence. They are prohibited from hearing evidence of truth on a charge of libel.[5] This rule is, of course, inconsistent with the conception of the magistrates' function as that of the protector of innocence. After the manner of English legislation, the rule is left untouched by Parliament except in the case where it hurts most, or where it can be represented to Parliament to hurt most, namely, where a newspaper is prosecuted for libel.[6]

It is probable that the preliminary hearing has greater effectiveness in some types of case than others. For example, the magistrates are particularly likely to dismiss a charge of manslaughter against a doctor as a result of professional negligence, where the evidence does not show that the negligence was the cause of the death, or does not indicate a sufficiently high degree of negligence to make it likely that a jury would convict. Again, the difficulties of the prosecution on a charge of rape are such that their case is peculiarly likely to break down, and a defendant may think that the preliminary hearing will give him a good chance of discharge. The Cambridge Department of Criminal Science found that in charges of rape, out of thirty-eight persons who were brought before the courts, three were discharged by the magistrates after the preliminary examination.[7] It will be seen that this proportion, though higher than the average, is still low. In some other cases the magistrates commit for trial, but find themselves able to reduce the charge, on the ground that the police have put their case too high. It is the duty of the magistrates to commit for trial only for the offence that the accused appears to have committed.[8] Instances have occurred where a charge of attempted murder has been reduced by the magistrates to a charge of wounding with intent, and charges of murder have been reduced to manslaughter.[9] But such action is exceptional.

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[5] *R.* v. *Carden, ex p. Labouchere* (1879) 5 Q.B.D. 1.

[6] Newspaper Libel and Registration Act, 1881, s. 4.

[7] *Sexual Offences* (London, 1957) 51.

Although, when the magistrates reduce the charge, their action will probably be effective, it need not always be so. This is because an indictment may make any charge that can be based on facts appearing in the depositions [10]; so that the advocate for the prosecution or clerk to the court who drafts the indictment is not bound by the decision of the magistrates in committing for trial. In fact, the charge against an accused person may be altered in the course of the proceedings no fewer than four times: the charge on which he is arrested may be altered in signing the charge sheet at the police station; the examining magistrates may alter it a second time in committing for trial; it may be altered a third time in drafting the indictment, and a fourth time by leave of the court during trial.

Reviewing this argument, the outcome may be said to be that the preliminary hearing could be abolished for all the good it normally does in saving innocent persons from vexatious prosecution, at any rate where the charge is brought by the police or other public officers. At the present day, the real purpose of the preliminary hearing lies in other directions. The magistrates are able to grant bail and legal aid and to make arrangements for the trial. These functions do not, however, require the formality of the preliminary inquiry as we know it. The only substantial purpose of taking depositions at length is to disclose to the defence the evidence for the prosecution.

The accused's right to advance knowledge of the case against him

The right of an accused person to know the evidence against him before his trial, so that he has the fullest opportunity to prepare his defence, is one of the most important of all safeguards in legal procedure. Completely provided for in Continental systems, at least for the more serious crimes, it is hardly recognised in the United States, and only partially in Scotland.[11] In England, it has come about in a haphazard way and is by no means fully recognised today. The right was first conferred by a statute of 1836,[12] which enabled defendants to obtain copies of the depositions taken by the committing magistrates. Then, as now, the right existed only when the case had first gone before examining magistrates. There was no general requirement that criminal charges had to be first examined by magistrates, and until comparatively recent times it was theoretically possible for a Bill to be sent before a grand jury, to be considered in private and found a true Bill, and for the accused then to be arrested and brought to trial without any knowledge of the case against him. This possibility was ended in 1933, when the grand jury was abolished, not for reasons of principle but only as a measure of economy. Even today a person might legally be put on trial on a coroner's inquisition without a preliminary hearing before magistrates and so without having a copy of the depositions against him; but in practice this does not happen because on a finding of guilt by a coroner's jury the accused is always brought before the magistrates in order to give him the benefit of that procedure. A person may also be charged, without the magistrates' committal, on the authority of a judge; it is rare for this course to be adopted, but occasionally it serves by way of appeal from a refusal of the magistrates to commit.[13]

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[8] *West* [1898] 1 Q.B. 174 at 179 (C.C.R.).

[9] Rouse Jones, *Magistrates Courts*, p. 361, states that evidence going to the mitigation of punishment, *e.g.*, tending to reduce murder to manslaughter, is not allowed at the preliminary investigation; but this is a mistake.

[10] Exceptionally, additional evidence to support or increase the effect of the depositions can be used to ground an indictment if notice be given to the accused before trial.

[11] In Scotland there is no preliminary hearing; the defendant is supplied with a list of the prosecution's witnesses and proposed exhibits, but except by

In practice, therefore, a person tried on indictment is apprised of the evidence against him before his case comes for hearing. In order to make the right effective, the Crown is regarded as under a duty to put forward its full case at the preliminary hearing. It would be improper to keep back one of the Crown witnesses in order to take the defendant by surprise at the trial; and in fact the practice is the reverse—to produce, where they exist, more witnesses at the preliminary hearing than will be needed to prove the point at the trial, in order to give the defence notice of their existence. If another witness becomes available after the preliminary hearing, the prosecution may call him at the trial, but will give an advance copy of his statement to the accused.[14]

The foreknowledge given by this procedure is of enormous

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courtesy, he is not shown copies of the precognitions of the prosecution's witnesses (taken privately), except in cases of murder or where the defence has met with unusual difficulty in preparing the case. See *Smith*, 1952, J.C. 66. For information on this and other points of Scots Law I am indebted to Professor T. B. Smith.

[12] 6 & 7 Will. 4, c. 114, s. 3.

[13] See *Harrison* [1954] Crim.L.R. 39; *Richardson* [1957] Crim.L.R. 80. In *Rothfield* [1937] 1 All E.R. 320; 26 Cr.App.R. 103, the procedure was used where the magistrate had fallen ill after he had almost completed the preliminary investigation.

[14] Archbold, 33rd ed., § 878.

importance to counsel for the defence, because it enables him to prepare his cross-examination. It needs considerable forensic skill to cross-examine effectively when the witness's story is not known beforehand, and defendants to criminal charges cannot always afford the best counsel. Knowledge of the evidence, therefore, aids materially in preventing a failure of justice owing to inexperience or lack of skill in handling the defence. It also enables the accused to produce his own witnesses in contradiction.

Objections to the practice of taking depositions

The very important limitation upon this right which still exists is that it does not apply to summary trial. If we regard the right to know the evidence as a fundamental part of fair criminal procedure, there is no justification for this exclusion of the right in summary proceedings. Moreover, even in indictable cases, the procedure of taking depositions is a cumbrous way of achieving a simple result. Consider its disadvantages. From the point of view of the accused there are, in the first place, the evils of publicity which have been fully considered by the Tucker Committee. These evils could, in themselves, be remedied. Perhaps an even greater evil is the fact that the preliminary hearing adds to the length of time for which the accused is kept in prison pending trial, or at least has the trial hanging over him, and also adds to his legal costs if he is represented. In a complicated conspiracy charge with a plurality of defendants these considerations weigh heavily indeed. The South African treason trial against 156 defendants (as they originally numbered) may be thought to be a travesty of ordinary legal procedure, but it forces upon the attention the injustice of doubling the length of complicated proceedings. In this connection, it must be remembered that the oppressive benevolence of the law in insisting that the evidence be heard twice can in no way be avoided by any action of the defendant, any more than it can be avoided by the prosecution. It is no use the defendant announcing that he wishes to plead guilty, since no plea is taken at the preliminary hearing; the whole tedious business must be gone through even though it is known that the defendant will plead guilty at the trial.

From the public point of view, there must be considered the inconvenience to the witnesses. They have already given their statements to the police, or to the solicitor for the police, and they will have to give them again at the trial. Only well-considered reasons should be regarded as justifying the requirement that they also give their evidence in person at the preliminary inquiry, waiting about for hours and perhaps days to do so. It often happens that when the police wish to make a serious charge, important witnesses who are known to exist fail to come forward. It may be that our present procedure must bear part of the responsibility for this reluctance of the ordinary citizen to involve himself in the working of the courts.

Attempts to shorten the procedure

The necessity to take depositions adds enormously to the labour of magistrates, and frequently causes them to fall into arrear not only with their summary jurisdiction but also with their work as examining magistrates. Thus Lord Goddard, in his address to the annual meeting of the Magistrates' Association in 1956, expressed the opinion that the law should be amended to relieve magistrates of the "intolerable strain" placed upon them by the present method of taking depositions. Sir Laurence Dunne recently spoke strongly about the arrears of remanded cases at Bow Street; and Sir Carleton Allen expressed the opinion that "magistrates, at least in populous centres, are quite sufficiently occupied nowadays with their summary jurisdiction." [15]

However, attempts to shorten the procedure radically founder upon the language of the statutes. The statements of the Crown witnesses have already been taken in the form of a proof of evidence, and it would therefore seem a businesslike thing for each witness to read his proof and swear generally that it is true. This, however, is not allowed: the witness must repeat his statement, and it must be written down a second time.[16]

Another experiment failed in *Phillips*.[17] D was brought before the committing justices, and thirty-five witnesses were heard against him over a period of three months. At the end of that time E was arrested and brought before the justices as a co-defendant with D. As the evidence of the thirty-five witnesses incriminated E as well as D, it became necessary to repeat their evidence when E was brought before the court. Instead of examining each witness anew in the presence of E, a course was taken which it was thought would save time. Each witness's deposition was read over to him and he was asked whether it was correct. On his affirmative answer, E was given the opportunity of cross-examining. D and E were committed for trial, and at the trial counsel for E moved to quash the indictment on the ground that the evidence had not been properly taken. The motion was disallowed and both accused were convicted. On appeal to the Court of Criminal Appeal it was held that the committal of E was a nullity and his conviction was therefore quashed.

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[15] [1958] Crim.L.R. 645, 653. Interest in the question was renewed by a letter of Mr. Christopher Shawcross to *The Times*, December 15, 1958, with subsequent correspondence.

[16] *Gee* (1936) 25 Cr.App.R. 198.

[17] [1939] 1 K.B. 63 (C.C.A.).

The decision in this case, which was based on the wording of the Indictable Offences Act, 1848, is left unaffected by section 4 of the Magistrates' Court Act, 1952, notwithstanding a recommendation of the Byrne Committee that it be altered.[18] It seems obvious that the course taken before the magistrates did not involve any injustice to E. The result of the decision of the Court of Criminal Appeal is a waste of time and money for all concerned; moreover, the delay is to the disadvantage of the accused, because he has to await his trial for a longer period.

There is a similar hardship where a magistrate dealing with the case by himself dies or resigns: here another magistrate must hear the case *de novo*.[19] Since the preliminary hearing is for the benefit of the accused person, common sense would suggest that he should be allowed to consent to a curtailment of it. Moreover, since it is rare for magistrates to refuse to send the accused for trial, it seems to be carrying legal precision too far to call witnesses to give their evidence over again, when it is on the depositions and the accused has already had his chance of cross-examining. Thus, whether the accused consents or not, the new magistrate should be allowed to proceed on the depositions as they have been left by his predecessor.

A compromise procedure which went some way in this direction was approved in *Ex p. Bottomley*,[20] the new magistrate allowing the evidence already taken to be read out to the witness who had given it, with permission to the defence to cross-examine anew. This procedure can be used only on a change of magistrates where the defendant remains the same, not where a new defendant is added.[21] We may also recall here the possibility of obtaining the leave of a judge to proceed without committal.[22]

The utility of depositions for the Crown

For the Crown, the preliminary hearing has only one substantial advantage. If one of the Crown witnesses should die or fall ill between the preliminary hearing and the trial, or be kept out of the way by the accused, the written statement of his evidence will be admissible at the trial, because the evidence was given before the examining justices on oath and with an opportunity for the defendant to cross-examine.[23] However, the utility of the procedure for this purpose is open to the following observations. First, preliminary proceedings themselves tend to lengthen the period before trial, and so increase the chance that a witness will not be available at the trial. If a greater effort were made to secure speedy trial, the depositions would become so much the less useful on this account. Secondly, the procedure of the preliminary hearing is not necessary where a witness is known to be in a dangerous state of health; his evidence may be taken on commission, with notice to the accused, under special statutory powers.[24] It may be noticed in this connection that the judges have refused to interpret the committal procedure as being intended primarily for the perpetuation of testimony.[25] Thirdly, the theory that depositions may properly be admitted because the accused had an opportunity to cross-examine the witness ignores the frequent practice of reserving the defence, either with the object of saving time and money or in order to conceal the tactics of the defence. A defendant or his legal adviser often fears that, by disclosing the defence at the preliminary hearing, he will enable the prosecutor to obtain witnesses before the trial to refute it. This practice of concealing the defence limits the amount of cross-examination that can be undertaken. There is no rule that the defence must be put to the witnesses for the Crown at the preliminary hearing.

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[18] Cmd. 7639 of 1949, p. 30.

[19] *Re Guerin* (1888) 53 J.P. 468.

[20] [1909] 2 K.B. 14.

[21] *Phillips*, above.

[22] *Rothfield*, p. 87, above.

Mention may also be made of the power to bind over witnesses conditionally to appear at the trial.[26] The practical effect of this power is to save merely formal witnesses from attending at the trial, unless their presence is demanded by either side. The Court of Criminal Appeal has expressed the hope that this power will be used more often,[27] but it is difficult for magistrates to be sure that the court of trial will side with their own opinion that evidence was merely formal.

Opinions of the Byrne Committee

The practice of taking depositions was considered by the Byrne Committee on Depositions in 1949.[28] Although the Committee suggested some minor improvements, it reached the unanimous conclusion that the taking of depositions should be preserved as an important and valuable function of magistrates. The advantages which the Committee saw in the practice were as follows. (1) Evidence is called while fresh in the mind of the witness. (2) The depositions show whether a prima facie case is made out, and if so in respect of what charge. (3) They help on the question whether the accused should be granted legal aid. (4) The justices may be able to save a witness's attendance at the trial by conditionally binding him over. (5) Depositions help the prosecution by enabling it to form an impression of the reliability of the witnesses, and, by disclosing defects in the evidence, enable it to be remedied or the prosecution withdrawn. (6) They enable the accused to know the case he has to meet. (7) They frequently lead to pleas of guilty at the trial, in cases that would otherwise be defended. (8) They are used in framing the indictment. (9) They enable an estimate to be made of the time the trial will take. (10) They are evidence for the court for the purpose of deciding whether to accept a plea of guilty. (11) They enable the recollection and reliability of the witness to be tested at the trial. (12) They are evidence where the witness is unable to attend at the trial. (13) They are sometimes referred to in the Court of Criminal Appeal and by the Home Secretary in his exercise of the prerogative of mercy. These advantages of the present system were set out by the Committee without any sufficient consideration of the question whether they might not be more simply secured in some other way, and the Committee paid no attention to the countervailing disadvantages which have already been considered in these pages.

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[23] See Criminal Justice Act, 1925, s. 13 (3).

[24] See Criminal Law Amendment Act, 1867, s. 6; Magistrates' Courts Act, 1952, s. 41.

[25] *R.* v. *Carden, ex p. Labouchere* (1879) 5 Q.B.D. at 7–8.

[26] Magistrates' Courts Act, 1952, s. 5 (2).

[27] [1952] C.L.Y. 2123.

[28] Cmd. 7639.

On the various advantages specified by the Committee, it is perhaps sufficient to append the following comments. On (1), the depositions are normally not evidence at all at the trial; consequently, their freshness is generally no merit. On the contrary, the practice of taking depositions tends to make the evidence at the trial staler than it would otherwise be. Advantages (2), (3), (6), (7), (8), (9), (10) and (11) could be substantially obtained by making use of the witnesses' proofs of evidence instead of depositions. It is true that these proofs would not be sworn, but the present law attaches a greatly exaggerated importance to the oath. Advantages (4) and (5) are altogether too minor to justify the present procedure. There is something in number (13), where the defendant pleads guilty at the trial and then appeals against sentence, but here again the proofs of evidence could be made a substitute for the depositions. It should be the duty of a trial court, before sentencing on a plea of guilty, to make sure that the accused accepts such facts alleged by the prosecution as are relevant to the question of sentence; if he does not accept them, evidence should be given on the disputed points. With this safeguard, the proofs of evidence of the witnesses for the prosecution should be usable by the Court of Criminal Appeal or Home Secretary on a review of sentence.

It may be mentioned here that under the present law there is no provision for enabling the prosecution to come to the court of trial without its witnesses where a plea of guilty is expected. This involves not only a waste of public money and witnesses' time but a hardship to the accused where he is afterwards required to pay the cost of the proceedings. The Byrne Committee made the valuable suggestion that the examining magistrates should be empowered to ask the accused, at the conclusion of the preliminary hearing, whether he intended to plead guilty or not guilty at the trial, with provision for allowing the accused to change his mind afterwards. The proposal has not been adopted. In Australia, it has been proposed to go even further and to dispense with the need for taking depositions where the accused indicates an intention to plead guilty.[29]

A point in favour of the preliminary hearing not mentioned by the Byrne Committee is that the publicity of the proceedings sometimes helps the defence to secure a useful witness. This point was considered by the Tucker Committee on Proceedings before Examining Justices,[30] which reached the conclusion that the advantage was not of sufficient weight to counterbalance the disadvantages attaching to pre-trial publicity. It may also be observed that the whole problem of fresh evidence in criminal cases needs reconsideration. It may happen that a newspaper report of the trial causes a new witness to offer himself for the defence, but our present practice attaches insufficient importance, as a general rule, to such fresh evidence. The fact that fresh evidence is discovered after the trial which, if before the jury, would probably have caused them to acquit, is often not allowed to disturb the verdict and sentence. This is clearly wrong.

A legislative proposal

To conclude this discussion of the preliminary inquiry, it is suggested that this inquiry should not be held unless it is demanded by either the prosecution or the defence. The accused might demand a preliminary inquiry if he hopes to get the charge dismissed or reduced; and his demand might sometimes induce the prosecution to consent to reduce the degree of crime charged, where it has been put higher than the evidence warrants.

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[29] [1955] Crim.L.R. 28.
[30] Cmnd. 479 of 1958, p. 15.

The abolition of the preliminary inquiry would greatly reduce the public and private cost of criminal proceedings and diminish the inconvenience and anxiety of accused persons pending trial, as well as the expense both to the accused and to the state of the double hearing. In addition, it would help to expedite the trial and so ensure that the witnesses spoke from a more recent recollection. Magistrates would, of course, retain their present jurisdiction in respect of bail and the award of legal aid. In deciding on legal aid, magistrates need to know something of the case for the defence rather than the case for the prosecution.

Where no preliminary inquiry is held, the accused should be furnished with copies of the proofs of evidence of the prosecution's witnesses.

This proposal to replace depositions by the witnesses' proofs of evidence is open to one objection, namely, the danger in some cases of letting the defendant know the identity of the witnesses against him before their evidence has been formally recorded. It is feared that the accused might take the opportunity to threaten or persuade the witness to withdraw his evidence before the trial. Although this fear may sometimes be well founded, two observations are in place. Even the formal taking of evidence is not a complete safeguard, because the witness's deposition is not evidence at the trial, but can only be used to nullify contradictory evidence given by the witness at the trial. Thus even under the present system an accused person might gain a substantial advantage if he could persuade a prosecution witness to modify the evidence given at the preliminary hearing. Moreover, the risk of the defendant "getting at" the witnesses for the prosecution exists only in some cases, and cannot, therefore, be an argument for holding a preliminary hearing in every case. If the police think that the accused is a member of a criminal gang, or is otherwise a person who may bribe or intimidate hostile witnesses, they can, under my proposal, demand a preliminary inquiry with the taking of depositions as at present. Experience will show how much need there is for the procedure on this count. In Scotland, where there is no preliminary hearing or taking of depositions, the defendant is given in advance a list of the prosecution's witnesses, and no serious difficulty appears to have been experienced with this system. Nor does difficulty seem to have been experienced with the English practice of notifying the accused of any witnesses who may have come forward to give evidence for the Crown after the completion of the preliminary inquiry.

The creation of regular local courts

Another expedient for expediting trials would be to fuse assizes and quarter sessions into a proper system of regional criminal courts in virtually permanent session; and this would have other great advantages for the administration of justice. As matters now stand, many courts of quarter sessions have inadequate work to keep them going regularly, particularly because of the division between borough and county quarter sessions; and fragmentation is carried still further by the division of jurisdiction between quarter sessions and assizes. An accused person may have to wait for as long as three months before he knows whether he is to be found guilty or not guilty; such a period of uncertainty is a severe strain upon the suspect and an unconscionable flaw in our legal system. It must be remembered that the accused may have been remanded in custody while awaiting trial, and this period of imprisonment is not only an expense to the State but a miscarriage of justice if the accused afterwards prove to be innocent.[31]

Proposals for a reorganised and unified system of local criminal courts have been made by a number of writers, including Mr. Claud Mullins and Mr. Cecil Whiteley,[32] and it is to be hoped that they will be supported by the Streatfeild Committee on the Business of the Criminal Courts which was recently set up to consider, in particular, the problem of providing the courts with the information they need in determining treatment. It seems obvious that the provision of permanent courts is an essential part of any scheme for furnishing the judges with background information obtained after conviction.

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[31] Incidentally, in this connection it is doubtful whether judges in sentencing for a crime always remember to give credit for the period of imprisonment pending trial. See, *e.g.*, *Layton* [1959] Crim.L.R. 61. The law should be altered to make sentences run from the beginning of the imprisonment. At present, a curious distinction is made: a person tried at assizes begins his sentence from the first day of the sittings of the court, whereas at quarter sessions the sentence runs from the day when it is pronounced, unless in either case the court orders otherwise (Archbold, 33rd ed., § 403).

[32] See particularly the latter's *Brief Life* (London, 1942), Chap. 12.

Prosecuting Officer

By Christopher Williams

Introductory Remarks continued—The Meaning of Evidence

"Ah! Come in, Newman," said Superintendent Portly. "Sit down. I'm glad you could come over. You've got your court tomorrow, and I hope you've got everything pretty well tied up. There's not much to bother you—in fact I should be surprised if you don't get a plea in all three cases. Now next week will be a different matter—you've got all those speeders, due cares and so on, with the new procedure. You'd better have a word with me about that, but not just now."

"Yes, sir," replied Inspector Newman. "I'd like to know just how you decide what cases to use the new Act [1] for, and what the point is about sometimes not using it. But at the moment I'd like to ask you to clear up a few things in evidence that I find a bit confused. It seems to me that it's all a bit artificial, the law of evidence, with plenty of scope for a crook to get off on a technicality."

"I know a lot of chaps muddle along thinking like that," replied the Superintendent, "but you know there's no real need for it. There's plenty in the laws of evidence, I admit that, but it's all pretty straightforward, so long as you've got the pattern of it in your mind, and understand what the purpose of evidence is. Look at it this way. You, as a policeman, get to know certain facts. From your knowledge of criminal law you come to the conclusion that a crime has been committed. In the light of those facts, and of others you go and dig out, you come to the further conclusion that a particular man is the person who committed that crime. You go and tell him so. No doubt he has something to say about it—and so further facts come into your possession. You arrest him and bring him before the court. You tell the court all the facts in your possession, and invite the court to come to the same conclusion as you did. The court invites the accused to lay any facts he wants to before the court, and listens to the accused's interpretations of the facts. The court then merely thinks over the relative force and value of the various facts, and throws out any facts that appear to be worthless or untrue. Then the court sees where the accepted facts lead to, and gives its decision: guilty or not guilty."

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[1] Magistrates' Courts Act, 1957.

" But where do the laws of evidence come in if it's as easy as all that, sir? " asked Newman.

" The laws of evidence, Newman," replied Portly, " are merely a series of safeguards resulting from experience which the law has imposed on the simple process I've just outlined. They set limits to the facts you (and the defence, don't forget) are allowed to put before the court, limits on who can put them before the court, and things like that. They are designed to keep the proceedings within reasonable bounds, and so help the court to come to a true verdict. Take for instance the first rule of all—the presumption that a person is innocent until he is proved guilty. The effect of this rule is that the accused person does not have to prove he is innocent, because it is the prosecution that has to prove him guilty, and until we have done that he is assumed to be innocent. Not that we have to prove his guilt absolutely, beyond all doubt, but merely beyond a reasonable doubt. That means that, after we have put facts before the court which show that the accused committed the crime, all the accused has to do is to raise a reasonable doubt in the mind of the court as to his guilt. Unless we can dispel that reasonable doubt, the accused will go free. Mind you, the doubt raised has to be a reasonable one; it won't do for him to pitch a fantastic yarn and hope to have it accepted just because it *could* be true; the court will only accept it if it seems reasonably likely."

" I see sir," replied Newman. " But when you say that the prosecution have to dispel a reasonable doubt, what does that mean exactly? When can that be done, and how? "

" Really, that's part of the 'order of speeches' business we spoke about the other day. You'll remember I said we'd go into that some time. At the moment, all I'll say is that the best way to dispel a reasonable doubt is to call evidence leading to a contrary conclusion. And the best time to do so is before the reasonable doubt is raised—that's to say, in your evidence-in-chief. What you should do is to go over all the facts you're going to put before the court, and see that they are sufficient for your initial burden of proof. Then have a look in your mind at all the possible " reasonable doubts " the accused seems likely to be able to raise, and see what facts are available to dispel such doubts, and what further facts can be dug out for this purpose. Then be ready to call evidence of all those facts."

" In other words, sir," said Newman, " you want to do most of your rebuttal in advance."

"Absolutely," replied Portly. "Always assuming, of course, that the other rules of evidence allow you to give those facts in your evidence-in-chief. I mean, you can only give evidence of facts if that evidence is both relevant and admissible at the time you give it. We'll go into the precise meaning of those terms later on, I hope, but from the practical point of view there may be facts that you have to avoid giving in evidence, although they seem helpful and true. So you have to be careful, in planning a rebuttal in advance, that what you hope to put forward is relevant and admissible."

"And if it isn't, sir?" asked Newman.

"Well," replied Superintendent Portly, "you have to wait until the 'reasonable doubt' is raised by the defence evidence, and then give rebutting evidence. A matter may not be relevant at one stage in a trial, but may become so at a later stage, you see. Well, if evidence by the defence brings into issue a fresh matter, it becomes relevant, and you are allowed, as I said, to give rebutting evidence after the defence evidence is finished.[2] Of course, this does not mean that you can just give a few salient facts in your evidence-in-chief, and keep a lot of vital stuff up your sleeve until after the defence has shot its bolt. You've still got to give all the facts in your evidence-in-chief. Rebuttal is confined to matters that have arisen unexpectedly in the course of the defence[3]—one of the cases speaks of matters which 'no human ingenuity could have foreseen'."[4]

"I understand, sir," said Newman. "Fairness to the accused again, I suppose. But if I could go back a bit, you spoke about the presumption that a person is innocent until he is proved guilty. I have read up a lot of other presumptions, and I must say that they don't fit into the pattern very well; it all seems rather arbitrary to me."

"Here again," answered Portly, "it's just a matter of what I might call the accumulated experience of the courts. Over the years the courts have come to the conclusion that certain facts ought to lead to certain conclusions, without the necessity of actual proof. This drawing of a conclusion from a certain fact is called a presumption of law. In some of them, the law says the conclusion *must* be drawn, and cannot be upset; that is an irrebuttable presumption of law. In others, the law says that the conclusion must be drawn in the first instance, but may be overset by rebutting evidence; that is a rebuttable presumption of law. In other words, a free move, so to speak, is given to the player producing the particular fact. To put it another way, they operate to lift the burden of proof, permanently or temporarily, from the shoulders of one side or the other. A child of twelve is accused of a crime—the prosecution prove the facts of the offence, and that the child did the acts prohibited. If we left it there, we would lose the case, because the fact that a child is less that fourteen years of age raises the presumption that it cannot form the necessary criminal intent. But if the child is over eight, the presumption is rebuttable, so we can give evidence showing that the particular child was able to form a criminal intent; thereupon (but not until then) the burden of raising a reasonable doubt passes to the child. If the child is under eight years of age, the presumption is irrebuttable, and we are not allowed to produce any evidence of the child's ability to form a criminal intent—no burden of proof passes to the child, because we are unable to fulfil our burden through the operation of the law of irrebuttable presumptions."

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[2] Magistrates' Courts Rules, 1952, r. 17.

[3] *R.* v. *Whelan* (1881) 14 Cox C.C. 595.

[4] *R.* v. *Harris* [1927] 2 K.B. 587.

"You spoke about presumptions of law, sir," said Newman. "What about presumptions of fact, then?"

"Oh, presumptions of fact," replied Portly; "they are the ordinary process of logical thought; the court is drawing them all the time. Put certain facts before the court, and the court may or may not, just as it chooses, draw certain conclusions. The law has nothing to say about those. We're all drawing such conclusions every day of our lives."

"One last thing, sir," said Newman. "Judicial notice—what about that?"

"Nothing there to worry about, young man," replied Portly. "That just means that you don't have to prove the existence of a public statute, or the common law, or local government boundaries, and things of that sort. Forget it."

"Well, sir," said Newman, "thank you very much. I will come over and report to you after court tomorrow. If you had time, I'd like to have a word with you about the Magistrates' Courts Act, 1952, and when you use it and when you don't; and also about the difference between relevancy and admissibility—I still can't seem to get them straightened out."

"Off you go then, Newman," said Portly. "Take things easy until you've found your feet, and remember—he argues best who argues least!"

Falsity in the Law of Forgery

By M. D. L. Worsley, *Barrister-at-Law*

Hubbard's case

The recent case of *R.* v. *Hubbard*, which was tried by Judge Aarvold on October 20, 1958, at the Central Criminal Court, affords the opportunity for a discussion of an interesting point in the law of forgery. The indictment included a count for forgery of a conveyance purporting to be signed by one Cayzer, and a count for forgery of a deed creating a charge by way of legal mortgage, also purporting to be signed by Cayzer. The facts relevant to these counts were that a local authority had a scheme to facilitate the purchase of houses whereby any one person might obtain a large mortgage from the authority providing the house was for the occupation of that person. The local authority would not advance money on mortgage to any one person in respect of more than one house and Hubbard, an estate agent, knew this. He had already obtained a mortgage for himself, and the prosecution case was that he desired another house and that he executed a conveyance of a house in the name of Cayzer and applied to the local authority for a mortgage in respect of that house, and in due course executed the mortgage deed in the name of Cayzer, having obtained the consent of Cayzer to the execution by him of both the conveyance and the mortgage. The local authority would not have agreed to the mortgage if they had known that Hubbard, having already got one mortgage, was the real mortgagor of the second house and not Cayzer. It was therefore clear that, on the principle expressed in the judgment of Lord Tucker in the House of Lords in the case of the *Board of Trade* v. *Owen and Seth-Smith*,[1] Hubbard had an intent to defraud.

Forgery is defined in section 1 (1) of the Forgery Act, 1913, as " the making of a false document in order that it may be used as genuine," and the question, therefore, is whether the signatures on these two documents were " false." At the trial the point was not argued and Judge Aarvold said that the documents were obviously false and Hubbard was convicted on both these counts.

What is " falsity " ?

The question as to the falsity of these documents is most interesting and not an easy one.

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[1] (1957) 41 Cr.App.R. 11 at p. 40.

In the case of *R.* v. *Hopkins and Collins* [2] (a decision of a court of five judges), the question of falsity was considered. The court said that what was false now depends upon section 1 (2) of the Forgery Act, 1913, and that the common law prior to that Act is no longer relevant. Reference was made to the Criminal Justice Act, 1925, s. 35 (1), but the court said that it need not rely on that section for the purpose of deciding the case. As the court said that, and then decided that the documents in that case were "false" within section 1 (2) of the Forgery Act, 1913, it is submitted that the statement that falsity now depends upon that Act and not the common law was wider than was necessary for that decision and was *obiter*. It appears from the judgment that there were *alterations* in the documents concerned and therefore, even if those documents were not false at common law, they were caught by the express words of section 1 (2), and it is submitted that that is all the judgment means.

It is to be noted that, although the case was adjourned to be argued before five judges, the final judgment was not a considered judgment.

It is respectfully submitted that that statement is wrong, and that there may be cases where a document is not "false" within section 1 (2), but is "false" under section 35 (1) of the Criminal Justice Act, 1925, and also at common law. There are two reasons for saying this:

1. If a document is only "false" if it comes within section 1 (2) of the 1913 Act, then the plain words of the Criminal Justice Act, 1925, s. 35 (1), are entirely inoperative, which cannot be. Surely the object of the section is to declare that any case of falsity at common law which is not within section 1 (2) is still to be regarded as "false."

2. In the recent case of *R.* v. *Potter*,[3] where the facts were similar to those under discussion, Paull J. held that two documents, then the subject of charges of forgery, were "false." Saying that he did not think that they came within section 1 (2) of the Forgery Act, he read section 35 (1) of the Criminal Justice Act, 1925, and ruled that the documents were "false" within that section. The judge thus did not consider himself limited in the way indicated in *Hopkins*' case. However, it appears from the report in *The Weekly Law Reports* that *Hopkins*' case was not cited in *Potter*. Nevertheless, as the statement in *Hopkins* already referred to was *obiter*, Paull J. was not bound by it in any event, and it is submitted that his view

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[2] (1957) 41 Cr.App.R. 231.

[3] [1958] 1 W.L.R. 638; 42 Cr.App.R. 168.

that a document may be false within section 35 (1) of the Criminal Justice Act, 1925, although not false within section 1 (2) of the Forgery Act, is correct.

If this is right, the question then is whether the documents in this case are false.

At first sight, the cases appear to conflict. It seems to me that the best way to approach it is to analyse the position on principle first, and then see how the authorities affect it.

In forgery, a document is " false " if it purports to be, itself, that which it is not.[4] The question is, therefore, whether the signatures purport to be that which they are not. To answer this, it is necessary to ask what they purport to be. The question is, then, whether they purport to be

(a) the signatures of B, or
(b) the handwriting of B.

This distinction is clear when one considers two examples, first, a rubber-stamp signature of a magistrate upon a summons, and, secondly, an ordinary ink signature of the drawer of a cheque. In the former case, the rubber-stamp signature does purport to be the signature of the magistrate but nobody imagines that it is his handwriting.

Another example of this type would be where X's secretary types X's signature, on his instructions, at the bottom of a notice or letter. The type of signature in either of these cases merely purports to show the *origin of the document*. Nobody would think that it is the very handwriting of the magistrate or of X. The fact that it is the signature of the magistrate or X is gathered not only from the signature itself but also from the surrounding circumstances. Thus, if a clerk merely puts the stamp of the magistrate's name upon a piece of dirty blotting-paper in order to see whether there is enough ink on it, no one would imagine that that was the magistrate's signature. But when it is on a summons, it is clear from the nature of the document that it is meant to be his signature. Likewise, if X's secretary idly types X's name on a bit of waste-paper, no one thinks it is X's signature. But when it is on a notice pinned on a notice-board, it is plain that it is meant to be his signature. In this sense, therefore, " signature " really means no more than to write the name of someone, with that person's authority.

However, in the second case, *i.e.*, a cheque, it is equally clear that the drawer's signature in ink purports to be not only his signature, but purports also to be his handwriting, because everyone knows that the peculiarities of the handwritten signature of a customer of a bank are the means whereby the bank is enabled to recognise that the cheque is genuinely the cheque of the customer. There, also, as in the previous examples, it is not only from the actual signature, but also from the surrounding circumstances, *e.g.*, that the signature is on a cheque, knowledge of banking practice, etc., that one is enabled to know what is the purport of the writing that constitutes the signature.

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[4] *R.* v. *Ritson* (1869) L.R. 1 C.C.R. 200.

Whereas signatures on certain documents similar to cheques such as bills of exchange would usually thus purport to be the handwriting of the person concerned, nevertheless, it cannot be said that that is *necessarily* the case. In *R.* v. *Forbes* [5] Coleridge J. said this:

> " If a person gives another leave to use his name on bills, and the person thus permitted writes the name of such person on a bill, this is as it were a signing by the person who gave the authority, although he had given no authority for the putting of his name on that particular bill."

There could be, therefore, the exceptional case where a signature on such a document may purport to be no more than the signature of that person either in his own handwriting or in that of another authorised so to sign. This might be so in the particular circumstances of the issue of any one bill that was not a cheque, because the parties thereto may not know the drawee or his handwriting and may *not be relying on that*, as a bank does in the case of a cheque, and they would therefore not care whether the signature, being part of or constituting, the acceptance, was made by the drawee or only with his authority. In such a case the signature purports to be no more than a signature either of the drawee or made by another with his authority.

It is submitted, therefore, that in order to decide whether a signature purports to be the signature of a person or whether it purports to be his handwriting, the whole of the surrounding circumstances must be looked at. In this connection it should be noted that the proposition that, in forgery, surrounding circumstances may be looked at in order to see what is the purport of a document, is supported by *R.* v. *Martin*.[6]

The cases considered

If the distinction drawn above, between a writing purporting to be a person's signature and a writing purporting to be a person's handwriting, is a correct one, then the cases, with one exception, are more easily reconcilable with one another. There are five on signatures and these will now be dealt with.[7]

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[5] (1835) 7 C. & P. 224.

[6] (1879) 5 Q.B.D. 34.

1. *R.* v. *Forbes.* Forbes accepted a bill in X's name and was indicted for forgery. Coleridge J. directed the jury that if Forbes had authority, or a genuine belief that he had authority, to do so, then they should acquit. He went on to make the remarks quoted at p. 103, *ante.* He did not mention intent to defraud.

The jury found that there was no fraud and yet, curiously enough, that Forbes had no authority nor a belief that he had. Upon the latter part of that finding the judge directed them to convict. There was no argument and no authority was cited on this point.

For the reasons already given above, this case is not in conflict with the suggested distinction.

2. *R.* v. *Beard,*[8] also a case tried by Coleridge J., which was very similar. No authority was cited on this point.

3. *R.* v. *Parish,*[9] tried by Lord Abinger C.B., was also upon very similar facts, and *R.* v. *Forbes* was cited, but the judge put the case upon the issue of intent to defraud.

In all these three cases, and, it is submitted, in spite of the curious finding of the jury in *R.* v. *Forbes*, if there was authority, or belief in it, there was no intent to defraud and vice versa, and the first two could also have been put upon the issue of intent to defraud.

4. *R.* v. *Hartshorn,*[10] a case tried by Crompton J., presents greater difficulties. The facts were that there was a local election. The relevant statute provided that where an elector could not write, he could make his mark and an attestor should write the initials of the elector near the mark and then sign his, the attestor's, name. In the case of various electors, Hartshorn had the electors' authority to do these things. Hartshorn was indicted, *inter alia*, for forgery. No authorities were cited on this point.

The judge said that the statute required any such mark to be made *propria manu* but that, as Hartshorn had authority, there was no false statement. This is difficult to understand. If the statute requires a mark to be *propria manu* then surely any mark purports to be the elector's handwriting (if it can be called such). If, then, the mark is made by someone else it must be false, because it purports to be the elector's handwriting and it is not the elector's handwriting. What would save the defendant would surely be the lack of intent to defraud. The judge did mention intent to defraud in defining the offence and, in view of the fact that, here again, if there was authority then there was no intent to defraud and vice versa, it must be presumed that the judge was not really dealing separately with intent to defraud and falsity, and that the decision turns upon the issue of intent.

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[7] They are referred to in Russell on *Crime*, 11th ed., Vol. 2, p. 1418.

[8] (1837) 8 C. & P. 143.

[9] (1837) 8 C. & P. 94.

[10] (1853) 6 Cox 395.

So understood, that case is not an authority upon falsity and does not affect the present argument.

5. *R.* v. *Potter* [11] was a case tried by Paull J. There, A authorised W to sign his, A's signature on two documents. W did so. It was of the essence of the transaction with which the two documents were concerned that the person signing should be the person whose name was signed. W was charged with forgery of the documents. Paull J. held that the documents were false, on the ground that W knew he had no right to sign them.[12] It is submitted that the ruling was correct, because the signatures of A purported to be made by A, and, as they were not so made, they were false. (However, it is difficult to see how the judge's ruling can be supported by the reason he gave. What a document purports to be depends upon what appears on the face of the document itself and upon the surrounding circumstances. If X alters the date on a document, then the document purports to be a document made on the date as altered. X's knowledge, or lack of it, as to his right to alter it, seems to be irrelevant to the issue of purport and of falsity.)

In any event, this case is consistent with my argument.

For the sake of completeness, several other cases that deal with the question of authority to make a document for another will be mentioned.

R. v. *Painter and Davis* [13] and *R.* v. *Smith*.[14] Both these cases touched on the question as to whether signatures made with authority were forgery, although the reference in *Painter* was obiter. No reasons were given in either, and the remarks of the judges concerned may have referred either to the issue of falsity or to intent to defraud. These cases are therefore of no assistance.

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[11] [1958] 1 W.L.R. 638.

[12] See p. 645.

[13] (1849) 13 J.P. 381.

[14] (1862) 3 F. & F. 504.

R. v. *Clifford*[15] and *R.* v. *Richardson.*[16] Both these cases concerned signatures by a person as agent, and would appear to raise different questions. If X signs *per pro* it is a statement in writing that, " I, X, act with Y's authority." If false, it is only a lie in writing, and that is not forgery.

Conclusions

It is submitted that the above cases are not inconsistent with the principle already expressed with regard to the purport of a signature. The principle is of general application but the question arises as to whether the deeds in this case were false. It is plain that, in this case, if the signatures on the deeds purported to be in B's *handwriting*, then they are false. However, if they only purport to be B's *signature*, in the sense used above, then as they *were* authorised by B, they *are* B's signatures and therefore are not false. Which, therefore, do they purport to be?

There are three reasons why it is suggested that the signatures purport to be the handwriting of the persons whose names they were.

(i) *The attestation clause*

The whole object of attestation is to witness the fact that the person signing *is* the person whose name is written upon the document.

Where a signature is attested, it cannot purport to be merely signature with the authority of the person whose name it is, because if that were so, what purpose does the attestation serve? The signature would be, *ex hypothesi*, not that of the person whose name it was, and the vital question would be whether or not the person signing had authority. How could attestation be a witness to the existence of such authority?

(ii) *Statutory provisions*

The Law of Property Act, 1925, s. 52 (1), provides that all conveyances (which, by definition includes mortgages) must be by deed, otherwise they are void.

Section 73 (1) of that Act provides: " Where an individual executes a deed he shall either sign or place his mark upon the same and sealing alone shall not be deemed sufficient."

Section 75 (1) provides: " On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor, as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor."

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[15] (1845) 2 C. & K. 202.

[16] (1860) 2 F. & F. 343.

The same observations apply to the last-mentioned section as I have already made above in regard to attestation clauses generally. What is the purpose of the section if not to ensure that, subject to a matter referred to in the next paragraph, conveyances be executed by the persons whose names are written thereon, *i.e.*, the purchaser in person? [17]

In *Hibblewhite* v. *McMorine* [18] the court said that there was a principle that:

> " . . . an attorney to execute and deliver a deed for another must himself be appointed by deed." [19]

If, therefore, a party purported to sign as attorney, he purported to sign as an attorney authorised by deed. As, presumably, he was not so authorised in this case, his signature would be false even in this event.

(iii) *The writing of the deeds*

No doubt both the conveyance and the mortgage end with words such as, "in witness whereof *the parties hereto* have hereunto set their *respective hands* and seals." This surely indicates that the signatures purport to be in the handwriting of the person whose name is written.

It is submitted that, for these reasons, the attestation clause in each of these documents shows that the signatures purport to be in the handwriting of the person whose name they are, and the signatures, and therefore the documents, are false. The writer can find no case squarely on the point as to whether one may authorise another person, except by power of attorney, to execute a deed in one's name, nor any case on the interpretation of these statutory provisions. Those provisions seem to require personal signature of a deed by a purchaser. Therefore, anyone seeing a deed that had been executed by a purchaser would take it to have been regularly made, and therefore the purport of the signature is that it is made by the party whose name it is. As far as these statutory provisions are concerned, there might be an exception where the person relying on the deed knew that the purchaser did not know the law, but we are not concerned with such an exception in this case.

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[17] 20 Halsbury's *Statutes*, p. 701.

[18] (1840) 6 M. & W. 200 at p. 214.

[19] See also *Powell* v. *L. P. B.* [1893] 2 Ch. 555 at p. 560.

Taking Other Offences Into Consideration—The Present Law

By R. D. Margrave-Jones, ll.b.

Continued from p. 26, ante

The foundation of the modern law on the subject of taking outstanding offences into consideration was laid down in *Syres*[1]:

"The judge before whom one case against a prisoner comes is entitled to take into consideration other cases which the prisoner admits."

Since *Syres,* an extensive code of law has been developed, and a consistent method of dealing with outstanding charges evolved, due mainly to the unifying supervision of the Court of Criminal Appeal.

This important decision finally dismissed all doubts as to the legality of the practice which was, as we have seen,[2] already in common use at assizes and quarter sessions by that time. Moreover, although the procedure was designed originally to meet the needs of trials on indictment, the rights of courts of summary jurisdiction to employ the practice has never been questioned by the High Court.

Conditions attaching to the practice

Before any outstanding offence can be taken into account, the consent of the court, of the accused and, possibly, of the prosecution must be obtained.

(*a*) *Consent of court*

The judge must agree to the use of the procedure; in theory, at least, he has an absolute discretion whether or not to do so. Although *Syres* merely held that a judge may take other offences into consideration, attempts have been made to persuade the Court of Criminal Appeal to put the trial judge under an obligation to deal with them in this way.

Lord Alverstone C.J., in *Shapcote* (*alias Heathcote*)[3] explained that "*Syres* only decides that a judge *may* take into account other charges which a prisoner admits in passing sentence. It would be a serious innovation to extend this principle, and to make it compulsory upon the judge so to do in the manner suggested. We see no reason why the court should lay down any such rule."

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[1] *Syres* (1908) 73 J.P. 13.

[2] [1959] Crim.L.R. 23.

[3] (1909) 3 Cr.App.R. 58.

Later pronouncements by the Court of Criminal Appeal have qualified this statement. In *Smith*[4] it was pointed out that "if the other charges are similar to those on which the prisoner has just been convicted, it is practically the duty of the judge to take them into consideration."

(*b*) *Consent of accused*

Since there is no trial of the "other" offences, the practice under discussion rests on the prisoner's consent to the procedure being adopted.

A prerequisite of this, however, is the accused person's admission of guilt.

In *Syres,* Channell J. said that the court is "entitled to take into consideration other cases which the prisoner admits." Three years later, in *McLean*[5] Lord Alverstone emphasised that ' if the prisoner does not admit the other charge against him, the court ought not in any case to take it into consideration in passing sentence."

Despite these clear instructions, however, trial courts often have to be reminded that there has to be a confession of guilt as well as consent to the procedure being adopted: see, for instance, the remarks of the Court of Criminal Appeal in *Bell*.[6]

Having admitted his guilt, the accused person must consent to the practice being employed. Here, too, trial courts constantly need reminding of this need for consent.

"A slack and casual treatment of such matters" was how the Court of Criminal Appeal described the action of quarter sessions in *Foster*.[7] All that was done was to call a police officer who said that the prisoner desired that the court should take other offences into consideration. The appeal court gave instructions as to the actual procedure required:

"The matter should be expressly and clearly put to the accused person. It should be ascertained with regard to each case whether he desires to admit the truth of the charge and desires that the offence should be taken into consideration. If he does, the indictment should be endorsed accordingly."

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[4] (1921) 85 J.P. 224, C.C.A.
[5] [1911] 1 K.B. 332.
[6] (1921) 16 Cr.App.R. 56.
[7] (1939) 27 Cr.App.R. 89.

This consent to the procedure should be given by the accused personally and not, as occurred in *Davis*,[8] through his counsel. In this particular case, the prisoner was present in court when his counsel consented on his behalf, and he made no objection to that course being taken; his consent was therefore inferred. Had the accused not been present, however, it would seem that agreement to such procedure could not have been given.

This matter is of some importance in trials by courts of summary jurisdiction, where the defendant can appear by counsel or solicitor, instead of appearing in person.[9] *Quaere* whether the legal representative of the accused who does not appear personally may properly request the magistrates to take other offences of his client into consideration.

It is submitted that, since the court cannot compel the attendance of such a defendant, the magistrates may take other admitted offences into consideration, provided that evidence is given of a statement that the accused wishes these offences to be considered. His advocate should be given specific instructions to accept the procedure in question.

Where the accused has been given no chance of asking for consideration of " other offences " by the trial court, that court should in no circumstances take them into account. In *Burton* [10] a police officer gave this improper evidence: " The police inquiries have proved definitely that the prisoner Burton has been responsible for the losses which have taken place owing to stealing on the railway." The Court of Criminal Appeal reduced the sentence imposed by the trial court, pointing out that " either the police could prove that statement, in which case they ought to have prosecuted the appellant, or at least have given him an opportunity of asking for those offences to be taken into consideration, or they could not, in which case they ought not to have invited the presiding judge to increase the appellant's sentence in respect of felonies with which he had never been charged, and therefore had never had an opportunity of disproving." [11]

A recapitulation of principle was given by Lord Goddard in *Marquis*.[12] He stressed that, when dealing with the procedure of taking other offences into consideration, " it is not enough for the court to be told that the prisoner has signed a form on which other offences are mentioned. The prisoner should be told what those offences are, and himself asked whether he admits them and desires them to be taken into consideration."

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[8] [1943] 1 K.B. 274.

[9] Magistrates' Courts Act, 1952, s. 99.

[10] (1941) 28 Cr.App.R. 89.

[11] See, also, the observations of Viscount Caldecote C.J. in *Van Pelz* [1943] 1 K.B. 157, at p. 160.

[12] (1951) 115 J.P. 329.

(c) *Consent of prosecution*

No mention was made in *Syres* of the need for the consent of the prosecuting authorities where a prisoner asks for outstanding offences to be taken into account. This requirement was first examined by the High Court in *McLean.*[13] Here, the prisoner pleaded guilty at Berkshire Assizes to a charge of housebreaking and asked the judge, Lawrence J., to take into consideration a further charge of arson for which he had already been committed for trial at Hertfordshire Assizes. The judge agreed to do so, although no steps had been taken to ascertain the views of the Hertfordshire police regarding this other charge. Subsequently, at Hertfordshire Assizes, McLean pleaded guilty before Grantham J. to the charge of arson and received a further sentence. The judge explained that the Hertfordshire police had, in fact, been unwilling to allow the indictment for arson to be dealt with in another county, because cases of arson had been very prevalent in Hertfordshire at the time.

In view of the fact that the prisoner had apparently already received some punishment for arson, the Court of Criminal Appeal reduced the second sentence. The Lord Chief Justice, delivering the judgment of the court (Lord Alverstone C.J., Pickford and Avory JJ.) laid down two main rules of practice:

(i) Where the other offence is " of the same character " as that of which the prisoner has been convicted, the judge may take it into account, whether or not a committal has been made. But if there has actually been a committal for the offence, the consent of the prosecution to this procedure being used should be obtained. " If the prosecution does not agree, the judge should not as a matter of course take the other charge into consideration, but should consider whether he should do so. It may be that the prosecution, for sufficient reasons, desires that the other charge should be separately and publicly investigated."

(ii) Where there has been a committal in another county for an offence of " another class," the judge ought not to take the other offence into consideration when the prosecution does not consent. " Even where the prosecution does consent, the judge ought still to consider . . . whether the public interest requires a separate investigation."

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[13] [1911] 1 K.B. 332.

"The prosecution" would appear to mean those authorities responsible for the prosecution of the offence proposed to be taken into account, though naturally the information as to whether or not they consent is usually given to the court by the prosecution in the case which is actually being tried.

It is clear that the view of the prosecution is merely one factor to be considered by the court when exercising its discretion. Where the outstanding offences are similar to those for which the prisoner has been convicted, this discretion becomes practically a duty.[14] In such a case, it would seem that the consent of the prosecution need not now be obtained. Since, however, it is the police who generally set the whole procedure in motion, their attitude is a matter of considerable importance.

The High Court has pointed out that "it may be that the police should always inform judges of known charges, so that, if the prisoner consents, they may take all into consideration in passing sentence. But that is a question of propriety, and not of law." [15]

Since *McLean,* little has been said from the bench about "the consent of the prosecution." This may be attributed to the fact that a uniform police method of dealing with persons facing a large number of charges has now been developed. The prosecuting authorities decide with which charges to proceed to formal trial and which to include on a list of outstanding charges. The accused is then served with a copy of this list and is free to admit all or any of the offences there set down. A Home Office circular of 1925, which instructs the police to give this preliminary notice to the prisoner, expressly adds that it is not intended that he should be asked any questions about it.

In accordance with the suggestion of the court in *Hicks*,[16] the police file at the court of trial a list showing the date, nature and place of each outstanding offence, and whether a warrant has been issued in respect of it.

Of course the police do not normally object to the taking into consideration of offences detailed on the list they have compiled. The official form makes this clear: "It will be open to you, before sentence is passed, to admit all or any of the other offences, and you may thereupon ask that any of these other offences which you have admitted may be taken into consideration."

Where, however, the prisoner gives the prosecution no prior knowledge of his intention and admits certain other offences for the first time in open court, the prosecution may have grounds for objecting to the use of the procedure in this summary manner.

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[14] *Smith* (1921) 85 J.P. 224, C.C.A.

[15] *Jones* (*aliâs Spanier*) (1908) 1 Cr.App.R. 196.

[16] (1924) 88 J.P. 68, C.C.A.

Jurisdiction of the court

It has been laid down in most emphatic terms that "no court has power to take into consideration, or should purport to take into consideration, cases which it has no jurisdiction to try."[17]

Thus, if an offence has been committed outside the territorial jurisdiction of the English court, the judge has no discretionary power to take it into account. In *Warn,* the Court of Appeal held that pending charges within the jurisdiction of the Northern Ireland courts could not be dealt with in this country by the procedure under discussion. At one time, it was thought that English courts were competent to take into consideration offences committed in Scotland: see, for instance, a Home Office circular of September 17, 1912. It appears, however, that Scottish courts do not employ the practice of taking outstanding charges into account[18]; certainly they decline to deal with offences committed in England.[19] Although the specific point has not yet been decided, it would seem that English courts have no power to "consider" charges triable only in Scotland; *semble,* the principle laid down in *Warn* would apply equally in such a case. *Quaere* whether English courts may employ the procedure to dispose of offences triable either in England or in Scotland. It is submitted that although they have power to do so, it would be undesirable for them to take this course without the consent of the prosecuting authorities in Scotland, because Scottish courts do not regard the English practice as a means of disposing of warrants outstanding in Scotland.[20] If no process has been issued in Scotland, the English court should deal with the "other offences" by formal trial.

There is, however, no objection to an English court taking into consideration offences committed in different counties of England.[21]

Although committed within the territorial jurisdiction of English courts, an outstanding offence, which by its nature must be tried by a particular court, may be taken into account only by that court. This principle was applied recently in *Anderson,*[22] where quarter sessions, when sentencing a soldier for larceny, took into consideration eight similar cases of theft, all of which were military offences, but also offences with which a civil court would have had jurisdiction to deal. The Court of Criminal Appeal held that quarter sessions was entitled to adopt this procedure, but, had the outstanding thefts been purely military offences, they could not have been disposed of in this way. Similarly, in *Warn's* case, it was decided that a court of quarter sessions could not properly take into account a pending charge of forgery which was triable only at assizes. It would seem that offences which are subject to summary trial only cannot be "considered" by a court of assize or quarter sessions. If, however, the summary offence is one for which the defendant is entitled to claim trial by jury under the Magistrates' Courts Act, 1952, s. 25 (1), such a claim must be clearly made before the superior court has jurisdiction to take that offence into account.[23]

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[17] *Warn* [1937] 4 All E.R. 327.

[18] *Hilson* v. *Easson* (1914) 51 Sc.L.R. 392.

[19] *MacWilliam* (1928) 21 Cr.App.R. 31.

[20] See *Hilson* v. *Easson.*

[21] *Syres* (1908) 73 J.P. 13.

[22] [1958] Crim.L.R. 333.

All decisions regarding the practice under discussion were given in cases that went on indictment, but the right of courts of summary jurisdiction to dispose of "other offences" in this manner has never been doubted by the High Court. There is no direct authority which confers on magistrates the jurisdiction to deal with outstanding charges, but the Court of Criminal Appeal may now be said to have impliedly recognised their power to do so. In *Vallett*[24] a woman who had no previous convictions but who, on conviction for larceny, asked the magistrates to take ninety-six similar cases into consideration, was thereupon committed to quarter sessions for sentence, under the Criminal Justice Act, 1948, s. 29 (1)—now the Magistrates' Courts Act, 1952, s. 29. It was held that she had been properly committed, for the words "character and antecedents" contained in that section were wide enough to include, *inter alia,* offences to be taken into account. In this case, as in *Marquis*[25] where justices had been asked—though, in fact, they had declined—to include outstanding offences in their sentence, the Court of Criminal Appeal did not express any doubt that the magistrates could properly have taken these offences into consideration.

If the rules laid down for trials on indictment apply *mutatis mutandis* to proceedings before magistrates, it would seem that courts of summary jurisdiction, including juvenile courts, may adopt the procedure only for cases which they have jurisdiction to try. Thus a magistrates' court would appear to have no power to take into account an offence which is triable only on indictment. Even where the offence is an indictable one which is triable summarily with the accused's consent, it is doubtful whether it can be taken into consideration by a magistrates' court. In such a case it would seem that the defendant should be informed of his right to jury trial and that he should elect to submit to the justices' jurisdiction before the outstanding offence is disposed of in this way.

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[23] *Simons* [1953] 2 All E.R. 599.
[24] [1951] 1 All E.R. 231.
[25] (1951) J.P. 329.

Discretion of the court

When deciding whether or not to exercise its discretion, the court should consider the gravamen of the charge on which the defendant stands convicted. If the " other offences " are similar in nature to this charge, the judge should normally accede to the prisoner's request for the procedure to be used [26] ; if the outstanding cases are of a different kind, however, they should less readily be taken into account. Pending charges of a more serious character than that of the main offence should be tried separately.[27]

It would seem that public policy may in any particular case warrant a refusal to take an outstanding matter into account, even where the prosecution agrees to the procedure being employed.[28] Thus a court of summary jurisdiction would hardly be justified in " considering " a charge on which the accused stood committed for trial, even with the consent of the prosecuting authorities.

The limits of this judicial discretion, however, are by no means certain. Although the convention was introduced originally to deal with outstanding offences of a similar nature to the crime for which the prisoner stands convicted, it would seem that the practice is no longer confined to such cases. Nowadays there is some authority for the view that other offences of " another class " may also be taken into consideration.

In *Syres,* as in all the preceding trials which involved the use of this procedure, the court took into account other offences of dishonesty—here, a series of false pretences—of exactly the same character as the crime of which the offender had been found guilty.

As we have seen, however, Lawrence J. in *McLean's* case, took a pending charge of arson into consideration when sentencing the prisoner for housebreaking. The Court of Criminal Appeal did not comment on the submission by counsel for the prosecution that the trial judge had had no jurisdiction to deal thus with an offence of a different character. The Lord Chief Justice was of the opinion that offences of " another class " may be taken into account if the prosecution consents.

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[26] *Smith* (1921) 85 J.P. 224.
[27] *Greig* (1910) 4 Cr.App.R. 151.
[28] *McLean* [1911] 1 K.B. 332.

This is a clear extension of the ruling in *Syres* and is difficult to reconcile with the view of the court in *Smith* that " the principle laid down in *Syres* is clearly limited to offences of the same class as that of which the prisoner stands convicted."

In practice, however, it seems that this latter pronouncement is often disregarded by the courts. In *MacMillan*,[29] for instance, the Lord Chief Justice had this to say to the appellant: " Do you wish the court to take into consideration three offences committed by you for which you have not been tried—bigamy in Cumberland in May, 1919; larceny of a bicycle in that county; and a theft of jewellery at Luton? "

Although the appellant, in fact, declined to allow the bigamy charge to be taken into account, it is clear that the court would have agreed to such a course being taken, although there was no similarity between the offences involved. Again, in *Bradley*,[30] the Court of Criminal Appeal took forty-two cases of false pretences into account in a sentence for larceny, although the trial judge had refused to deal with these outstanding cases, being of the opinion that they were not sufficiently of the same nature to justify his doing so.[31]

In the absence of any clear ruling from the bench the difficulty of deciding what kind of offences may be taken into consideration will remain.

The position is complicated further by the fact that there has been no strict definition of what constitutes an offence of the " same character " or of " another class." Presumably this is a matter for the exercise of a wide judicial discretion. In *Bradley's* case, the Court of Criminal Appeal held that the trial judge was wrong in not considering charges of false pretences in a sentence for larceny; but no indication was given in the judgment as to how the trial courts should decide such matters in the future. Subsequent cases have done little to clarify the position.

As a result, widely differing views are held throughout the country regarding the scope of the practice under discussion. Whereas some courts are prepared to " consider " almost any outstanding charge mentioned by prisoner or prosecution, in order to give the criminal a " clean sheet," others refuse to adopt the procedure unless the pending charge is essentially of the same nature as the actual charge being examined.

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[29] (1921) 16 Cr.App.R. 3.

[30] (1922) 16 Cr.App.R. 113.

[31] See also *Lloyd* (1923) 130 L.T. 319.

In view of this unsatisfactory state of affairs, it would seem that a practice direction should be given by the High Court, setting out the limits of this judicial discretion.

[*To be concluded*]

Practice and Procedure

First Offenders Act, 1958

Imprisonment as an alternative punishment on a first offender

The First Offenders Act, 1958, requires courts to be satisfied that no other method of dealing with the case is appropriate before they " pass sentence of imprisonment " on a person who has not previously been convicted of an offence punishable by imprisonment in the first instance. What is meant by " sentence of imprisonment " in this context? Does it include imprisonment for failing to carry out an order of the court and imprisonment in default of payment of a fine or other sum of money? A person in gaol for non-compliance with a court's order, financial or otherwise, would, no doubt, regard himself as sentenced to imprisonment. He would certainly be treated by the prison authorities as if he were; and, under the Prison Rules, he would earn remission of sentence for good conduct provided the term exceeded one month.

There is no definition section in the First Offenders Act, but it seems unlikely that " pass sentence of imprisonment " would be interpreted in the High Court, if the matter were raised as a point of law, by reference merely to the practical results of the adjudication. The basic consideration would be that when a court imposes a fine or orders something to be done or left undone, it is not concerned with imprisonment primarily; that factor only enters into the adjudication when methods of enforcing compliance with the demands of the court have to be provided. In the case of magistrates' courts, powers of enforcement are the creation of, and strictly laid down by, statute—mainly by the Magistrates' Courts Act, 1952. It must, therefore, be the terms of that statute which will decide whether or not terms of imprisonment in such circumstances are " sentences of imprisonment." It is significant, in this connection, that nowhere in the enforcement sections is the word " sentence " used in relation to the imprisonment which courts are authorised to impose. But, more important than this fact are two definitions in section 126, namely: "'Sentence' does not include a committal in default of payment of any sum of money, or for want of sufficient distress to satisfy any sum of money, or for failure to do or abstain from doing anything required to be done or left undone"; and "'Impose imprisonment' means pass a sentence of imprisonment or fix a term of imprisonment for failure to pay any sum of money, or for want of sufficient distress to satisfy any sum of money, or for failure to do or abstain from doing anything required to be done or left undone." This last definition not only shows that "impose imprisonment" is not just synonymous with "sentence to imprisonment," but also makes a clear distinction between "pass a sentence of imprisonment" and "fix a term of imprisonment" for non-compliance with an order of the court.

It seems plain then that "pass sentence of imprisonment" in the First Offenders Act does not cover imposing imprisonment as an alternative to some other adjudication—at least, so far as magistrates' courts are concerned; accordingly, when fixing a "default" term of imprisonment, either as part of the original adjudication or at a subsequent means inquiry, they do not need to consider whether the defendant has been previously convicted. It is noteworthy that, in this respect, the Act of 1958 departs from the pattern of the legislation regarding imprisonment of persons under twenty-one—although, in most matters, the new statute specifically models itself on the relevant provisions of the Criminal Justice Act, 1948. Section 17 (2) of that Act reads: "No court shall impose imprisonment on a person under twenty-one years of age unless, . . ."; and, in section 80, it is laid down that "'Impose imprisonment' means pass a sentence of imprisonment or commit to prison in default of payment of any sum of money or for failing to do or abstain from doing anything required to be done or left undone." In the case of a young offender, therefore, a court, unless it is satisfied that no other way of dealing with the case is appropriate, must not fix a term of imprisonment as an alternative part of its adjudication.

[A. E. JONES.]

Summary Justice

Agriculture

For setting spring traps other than approved traps, contrary to section 8 of the Pests Act, 1954, a pig farmer was fined £2. The traps had been set to catch rats; Allen: Gloucester County Magistrates' Court (*Gloucester Citizen,* December 12, 1958).

Litter

For depositing litter in a public place, contrary to section 1 of the Litter Act, 1958, a fine of £3 was imposed after the magistrates had considered whether or not the derelict motor-car which was the subject of the charge constituted litter; Ferris: Gloucester County Magistrates' Court (*Gloucester Citizen*, December 12, 1958).

Rivers

Summoned by the Thames Conservancy Board for unlawfully driving a car into the Thames, "which might injuriously affect the safety of the Thames." William James Wade, of Walton, Surrey, was fined £5. He pleaded guilty: Feltham Magistrates' Court (*Manchester Guardian*, December 31, 1958).

Soliciting

For persistently soliciting in a public place for immoral purposes, contrary to section 32 of the Sexual Offences Act, a man was fined £7. The defendant had been driving slowly through the city centre, where he approached a woman who got into the car but left after a few minutes. The defendant then approached a second woman: Nottingham Magistrates' Court (*The Times*, December 10, 1958).

Case and Comment *

CROWN PRIVILEGE

Police notebooks—fraud alleged

Auten v. Rayner

Court of Appeal: Lord Evershed M.R., Sellers and Pearce L.JJ.: October 20–23, November 4: [1958] 1 W.L.R. 1300.[1]

In one of two consolidated actions the plaintiff alleged conspiracy, malicious prosecution, and false imprisonment against the defendants, one of whom was a detective constable in the C.I.D. By his affidavit of documents this defendant disclosed that he had in his possession or power reports made by him in the course of his duty to his superior officers, and also communications between the Metropolitan Police Force and other police forces. The Home Secretary made a claim of Crown privilege for these documents, stating in one of his affidavits " . . . upon the grounds of public interest they ought not to be produced because they belong to a class which it is necessary in the public interest for the proper functioning of the public service to withhold from production."

The plaintiff challenged the validity of this claim on the following grounds: (1) The affidavit was sworn personally by the Home Secretary, who was remotely connected by marriage, a past directorship and a shareholding with one of the defendants (not the constable), and although no bias was in fact suggested, the plaintiff might reasonably suspect bias. (2) That if, as the plaintiff submitted had been done, a prima facie case of fraud was made out, privilege could no longer be claimed.

Held, (1) that on the facts of this case, the plaintiff ought reasonably to accept it that the Home Secretary's determination was without bias. It was therefore not necessary to decide what effect, if any, such a suspicion might have if it were reasonable. (2) The principle that, in an action between private individuals, where fraud is alleged the parties concerned lose the benefit of their private right to privilege is not applicable to the right of the Crown to withhold documents from discovery; it is somewhat misleading to refer to this right as "Crown privilege."

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* Reported, unless otherwise stated, by David Calcutt and Henry Palmer, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the plaintiffs: *D. N. Pritt, Q.C.,* and *J. F. Platts-Mills* (instructed by W. H. Thompson). For the Home Secretary: *Sir Reginald Manningham-Buller, Q.C., A.-G.,* and *Rodger Winn* (instructed by the Treasury Solicitor). For the first and second defendants: *H. K. Woolf* (instructed by Herbert Baron & Co.). For the third defendant, the detective constable: *G. de P. Veale, Q.C.,* and *W. W. Stabb* (instructed by Solicitor, Metropolitan Police). For the defendants to the second appeal: *G. W. Cheyne* (instructed by Chamberlain & Co.).

Semble, that the Minister is in no way concerned with the issues between the parties, or the importance in the action of the documents; his sole concern is the interest of the State in withholding the documents, balanced against the requirements of the due administration of justice, which strongly favour disclosure. [D. C.]

Commentary. The principles governing "Crown privilege" have been fully considered in an article in [1959] Crim.L.R. 10. The main interest of the present case is that it establishes that the Crown's claim of privilege is just as conclusive in cases in which fraud is alleged as in other cases. The court emphasised that it expressed no view as to whether a prima facie case of fraud had been made out, the Attorney-General being content to argue the question of the validity and conclusiveness of the Home Secretary's decision on the assumption that it had.

EVIDENCE

Hearsay—statement to police officer through interpreter—admissibility of police officer's evidence as to what was said

R. v. Attard

Central Criminal Court: Gorman J.: December 8, 1958.[2]

When Detective Superintendent William MacDonald was about to give evidence of a conversation between himself and the prisoner conducted through an interpreter, Mr. Clarke, for the defence, in the absence of the jury, submitted that as the superintendent spoke only English and the prisoner only Maltese, whereas the interpreter spoke both English and Maltese, the prisoner neither understood the questions put in English to the interpreter nor the subsequent answer in English, and consequently these were not admissible in evidence as statements made in the presence and hearing of the prisoner: the superintendent's evidence of what the prisoner said to the interpreter was inadmissible as hearsay: the only valid witness as to what the prisoner said, no one else having been present, was the interpreter.

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[2] For the prosecution: *T. Christmas Humphreys* and *J. Mervyn Griffith-Jones* (instructed by the Director of Public Prosecutions). For Attard: *Edward Clarke, Brendan Shaw* and *Audrey Jennings* (instructed by Messrs. Good, Good & Co.).

Mr. Humphreys, for the prosecution, in reply, submitted that the evidence of the superintendent was admissible for four reasons: (1) this point had never been taken before; (2) if the point were good it would mean a profound change in the administration of the law; (3) interpreters were not to be regarded as police officers, they were not expected to take an intelligent interest in the proceedings, they were impartial cyphers: it being better that they should not understand the issue being decided so that their interpretation be less likely to be influenced by their personal views on the matter; (4) The hearsay rule was itself contradictory, there were a number of exceptions to it and the present point was an exception sanctioned by practice. He added that the interpreter himself would be called to say that what he said in his interpretation was a true interpretation of what the prisoner said to him.

Held, "I think in all the circumstances here the submission of the defence is a correct one, and that the evidence ought not to be given through the mouth of the detective superintendent in the witness-box." [C. B. ORR, *Barrister-at-Law*.]

Commentary. The superintendent would not have given evidence of what the prisoner said; but of what the interpreter told him the prisoner said; which is hearsay. *Cf.* Wigmore, *Evidence* (3rd ed.), §§ 668, 1810.

Indecent assault—corroboration—series of incidents

R. v. Chandor

Court of Criminal Appeal: Lord Parker C.J., Cassels and Barry JJ.: December 2, 1958: *The Times*, December 3, 1958.[3]

C. was convicted at quarter sessions of five offences of indecent assault. C. was a schoolmaster, and the alleged offences were said to have taken place with three different boys between the ages of thirteen and fifteen on five occasions between May, 1956, and June, 1958. C.'s defence was that the incidents never took place at all, and that the boys' stories were merely products of their imagination. Summing-up, the recorder, after dealing with the need for corroboration, said that where a series of incidents was deposed to by different witnesses it might help the jury to determine the truth of the matter. C. appealed to the Court of Criminal Appeal on the ground of misdirection.

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[3] For the appellant: *Neil McKinnon, Q.C.*, and *D. A. Hollis* (instructed by Messrs. Wilders and Sorrell). For the Crown: *J. L. E. MacManus* (instructed by the Director of Public Prosecutions).

Held, allowing the appeal, that the recorder had based his statement in the summing-up on *R.* v. *Campbell* [1956] 2 Q.B. 432, and referred to that case in very general terms. So unqualified it covered a case such as the present, where the accused was saying that the incident never took place at all. This court did not think that the relevant passage in *Campbell's* case was ever intended to cover that. Evidence of a succession of incidents was relevant in many cases to help to determine the truth of any one incident, for example, to prove identity, intent or guilty knowledge, or to rebut a defence of innocent association. But this court could not see that such evidence had any relevance to determine whether a particular incident ever occurred. Accordingly the appeal would be allowed. [H. P.]

Commentary. *Cf. R.* v. *Sands* [1958] Crim.L.R. 256 and commentary thereon in which it was suggested that Lord Goddard's dictum that a succession of these cases may help the jury " to determine the truth of the matter " must at least be qualified. Such evidence is not admissible and should not be considered by the jury, as having a direct bearing on the issue of whether the accused did the act. It is admissible on the issue of whether the witness is speaking the truth when he says the accused did the act. Such evidence does not, therefore, amount to corroboration. Corroborative evidence must do more than that to show that the principal witness is speaking the truth, and must tend to implicate the accused in a material particular, independently of the principal witness's evidence.

The Recorder's direction in the present case does not appear to have given the jury any guidance as to the purposes for which the evidence of the other crimes was relevant, and they may well, therefore, have taken it into account in deciding that C. did the acts charged.

It is, of course, unrealistic to expect a jury to consider evidence for one purpose and to ignore it for another. Yet the English law of evidence often requires them to do just that. *Cf.* the rules relating to complaints in sexual cases.

Depositions—admissibility as evidence—deponent so ill as not to be able to travel

R. v. Linley

Leeds Assizes: Ashworth J.: December 16, 1958.[4]

L. was charged with robbing with violence one George Champion of a wallet.

Before the trial commenced, counsel for the defence asked the judge to rule that the deposition of Mr. Champion should not be read at the trial. Although Mr. Champion had given evidence on oath before the examining magistrates, he was an old man, and his physical condition had deteriorated to such an extent that it was virtually certain that he would never be in sufficiently good health, to be able to come to give evidence at the trial.

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[4] For the prosecution: *A. W. Stephenson* (instructed by Prosecuting Solicitor, East Riding of Yorkshire). For the defence: *V. R. Hurwitz* (instructed by J. Wurzal & Co., Leeds).

Counsel argued that, although the court had the power under the Criminal Justice Act, 1925, s. 13 (3), to permit the reading of Mr. Champion's deposition in these circumstances, the fact that in section 13 (3) the words used were " may . . . be read " indicated that the court had a discretion to refuse to permit the deposition to be read, notwithstanding that the conditions set out in the subsection were satisfied. He cited *R.* v. *Collins* (1938) 26 Cr.App.R. 177, which, although not on the precise point involved, he submitted, laid down at pp. 181–182 the principles which should guide the court in exercising its discretion. In the present case the witness whose evidence it was sought to have read was the principal witness against L. His evidence was substantially the case for the prosecution and would inevitably have to be challenged as to its accuracy. The provisions of section 13 (3) were intended to assist the court in cases where there would be no possible injustice to the accused in reading the depositions. L. had not been represented before the magistrates. He conceded that the prosecution might be put in a difficult position if the depositions were excluded, but the disadvantage to the prosecution should be weighed against the grave risk of injustice to the accused if this evidence were read.

Counsel for the prosecution argued that *Collins* was not intended to refer to circumstances such as these. All it decided was that where witnesses had been conditionally bound over they should attend if their attendance was requested by the defence and their depositions should not be read. He conceded that the use of the word " may " implied that the court had a discretion in the matter, but contended that in view of the considerable inconvenience and injustice involved in excluding the evidence, the discretion to exclude should only be exercised where injustice to the accused was manifest, perhaps, for instance, in capital cases. It was entirely a question of degree, and in this case he submitted that the deposition could properly be read.

Ashworth J. ruled that it would not be right to permit the deposition of Mr. Champion to be read at the trial.

Linley was thereafter tried and eventually acquitted.

[JOHN M. COLLINS, *Barrister-at-Law.*]

Commentary. In *R.* v. *Collins* the accused announced his intention before the examining justices, of pleading guilty. The justices therefore bound over all the witnesses conditionally. At the trial, the accused pleaded not guilty, and, no witnesses being present, the deputy-chairman allowed all the depositions to be read under section 13. The jury convicted, without seeing a single witness in the witness box. The Court of Criminal Appeal, held that the course adopted, though within the express words of section 13, "was not intended by the statute and could never have been contemplated by Parliament." The object of section 13 was simply to save time and expense "in cases where no possible injustice could be done to anybody." It seems implied in this ruling that the court has the discretion, which it was conceded to have, in the present case.

If the judge's discretion is to exclude the evidence, except "where no possible injustice could be done to anybody," it obviously extends well beyond the actual facts of *Collins* and would seem to apply to most cases where the evidence of a principal witness is in issue. Ashworth J. is reported to have observed, in argument, that in a case of rape, he would have thought that the evidence of the prosecutrix ought not to be read.

HABEAS CORPUS

Divisional Court—decision equivalent to a decision of the whole Division

Re Hastings (No. 2)

Queen's Bench Divisional Court: Lord Parker C.J., Hilbery and Diplock JJ.: [1958] 3 W.L.R. 768.[5]

The applicant for a writ of habeas corpus had, upon a previous occasion, applied for the writ to a Divisional Court of the Queen's Bench Division of the High Court, which had refused it. He now applied upon identical grounds to a Divisional Court of the same Division, whose members were however not those of the earlier court. The applicant had earlier attempted to appeal from the first refusal to the Court of Appeal, which had refused to hear the appeal on the ground that it has no jurisdiction to hear an appeal from a decision of the High Court in a criminal cause or matter.

Held, the decision of the Divisional Court is equivalent to the decision of all the judges of the division, and the applicant, having been heard once by a Divisional Court, was not entitled to be heard again.

Per curiam: Lord Hailsham L.C. may have gone too far in *Eleko's Case* [1928] A.C. 459 in saying that there is at all times a right to go from judge to judge of the same division if the writ is refused, for this right may be confined to vacation time; but that case, though only of persuasive authority, will not lightly be disregarded.

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[5] For the applicant: *Neil Butter* (instructed by the Official Solicitor). For the Governor of Wandsworth Prison: *Sir Harry Hylton-Foster, Q.C., S.-G.,* and *Rodger Winn* (instructed by the Treasury Solicitor).

There should be appeal to the House of Lords in criminal matters where the writ of habeas corpus has been refused. [D. C.]

Commentary. The court said that there was no doubt that before the Judicature Acts an applicant could go successively to each of the three common law courts and the Court of Chancery and it may well be that in vacation he could go from judge to judge even of the same court. But it appeared clear that he could not apply twice to the same court on the same facts. A Divisional Court of the Queen's Bench Division, after 1880, exercises the jurisdiction of each of the three common law courts sitting *in banc*. A decision of a Divisional Court is equivalent to the decision of all the judges of the Division, just as the decision of one of the old common law courts sitting *in banc* was the equivalent of the decision of all the judges of the court. An applicant who applies twice to a Queen's Bench Divisional Court is, therefore, in the same position as an applicant who, before 1873, made a second application to the same common law court.

The court expressed no opinion as to whether a Divisional Court of another Division would have jurisdiction to hear an applicant who had failed in the Queen's Bench Division; but it would seem to follow that a Divisional Court of the Chancery Division would have such jurisdiction.

Eleko's Case, being a decision of the Privy Council on appeal from the Supreme Court of Nigeria, though of great persuasive authority is not binding on English courts.

For previous proceedings see [1958] Crim.L.R. 332 and 687.

MALICIOUS WOUNDING

Provocation—mere words—whether a defence to a charge of malicious wounding

R. v. Cunningham

Court of Criminal Appeal: Lord Parker C.J., Cassels and McNair JJ.: December 8, 1958: *The Times*, December 9, 1958.[6]

C. was convicted at quarter sessions of malicious wounding. The facts were that C., who was travelling in a bus, passed another passenger as he was about to get off. According to C. the other passenger made a remark suggesting that C. should commit some homosexual offence with him. Thereupon C. savagely attacked the other passenger. The victim of the attack had been cross-examined by counsel for the defence, who put to him that he had suggested to C. that they should commit some homosexual offence together. As a result of this cross-examination the deputy chairman allowed counsel for the prosecution's application to cross-examine C. as to his previous convictions. C. appealed to the Court of Criminal Appeal on the ground that the cross-examination of C. as to his previous convictions was improperly allowed.

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[6] For the appellant: *R. H. Tucker* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Malcolm Ward* (instructed by Messrs. T. Horton & Sons).

Held, dismissing the appeal, that even if the defence of provocation had been open to C. it seemed to the court that a question such as was asked in this case must of necessity bring in the character of the accused. But it was unnecessary to decide that question because it was clear that in a case of malicious wounding there was no such thing as a defence of provocation. Such a defence, as had been made perfectly clear by Viscount Simon in *Holmes* v. *Director of Public Prosecutions* [1946] A.C. 588, arose only in the case of murder to reduce the offence to manslaughter. In any event, there was no suggestion that mere words, except in a case under the Homicide Act, 1957, were sufficient to found a defence of provocation. Accordingly, there was in the present case no defence, and the fact that C.'s previous convictions were before the jury could have made no difference at all. The appeal would, therefore, be dismissed.

[H. P.]

Commentary. Under section 1 of the Criminal Evidence Act, 1898, an accused person who is called as a witness may not be asked any question tending to show that he has committed, or been convicted of, or been charged with, any offence other than that wherewith he is then charged, or is of bad character; unless, *inter alia,* the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution.

The allegations made by the prisoner in the present case were certainly imputations on the character of the prosecution witnesses; but " An accused is not to be regarded as depriving himself of the protection of the section, because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses ": *Stirland* v. *D. P. P.* [1944] A.C. 315, 327, *per* Viscount Simon L.C. So it has always been held that a person charged with rape does not expose his character to cross-examination simply because he alleges that the prosecutrix consented (*R.* v. *Sheean* (1908) 21 Cox 561) or indulged in indecent conduct, tending to show that she consented (*R.* v. *Turner* [1944] K.B. 463).

If provocation had been a defence to the crime charged it would have been arguable that the accused might have made his attack with impunity under this rule. The extent of the rule is, however, uncertain and it does not apply where the prisoner alleges that the prosecution witness was himself the author of the crime charged (*R.* v. *Hudson* [1912] 2 K.B. 464) or where he alleges that a confession which he has signed was dictated to him by a police officer who is a witness for the Crown (*R.* v. *Clark* [1955] 2 Q.B. 469). As provocation was no defence to the crime charged, it is clear, at least in the light of cases subsequent to *Stirland* such as *R.* v. *Jenkins* (1945) 31 Cr.App.R. 1, that C. could not shelter behind the rule stated by Viscount Simon in *Stirland* and quoted above. The court was of the opinion that, even if provocation had been a defence, the accused's character would still have been brought into issue.

RECEIVING

Property obtained in circumstances amounting to a misdemeanour —no knowledge of particular misdemeanour

D. P. P. v. Neiser

Queen's Bench Divisional Court: Lord Parker C.J., Streatfeild and Diplock JJ.: [1958] 3 W.L.R. 757.[7]

Two informations were preferred against the defendant under section 33 (1) of the Larceny Act, 1916, each alleging that he received property knowing it to have been obtained under circumstances amounting to a misdemeanour, and particularising the misdemeanour. Upon a submission of " no case to answer " the justices were of opinion that the property was obtained by the misdemeanours particularised; that there was evidence that the defendant knew that the property had been obtained by some dishonest means; but that there was no evidence that the defendant knew of the particular misdemeanours by which each piece of property had been obtained. They accordingly held there was no case to answer.

Held, dismissing the appeal, (1) section 33 (1) of the Larceny Act, 1916, creates two classes of offence, one a felony and the other a misdemeanour, according to whether the property was obtained in circumstances amounting to felony or misdemeanour. Accordingly it would have been sufficient to charge and prove that the receiver knew that the property fell into the general category of property obtained under circumstances which do in law amount to misdemeanour. It would not have been sufficient to prove only knowledge that the property was dishonestly obtained, for that would be equally consistent with an erroneous belief that the property was obtained under circumstances amounting to felony, and such an erroneous belief would entitle the defendant to be acquitted. The justices were wrong in holding that the prosecution must prove knowledge of the actual misdemeanour by which the property was obtained.

(2) In the present case there was no evidence from which the justices could have inferred that the defendant knew that the

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[7] For the Crown: *J. H. Buzzard* (instructed by the Director of Public Prosecutions). For the defendant: *W. M. F. Hudson* (instructed by J. H. Fellowes).

property had been obtained by misdemeanour, as opposed to felony.

Per curiam: The "doctrine" of recent possession is a way of referring "to the inferences of fact which, in the absence of any satisfactory explanation by the accused, may be drawn as a matter of common sense from other facts . . . where property has been stolen and there is nothing in the circumstances to point to the accused's having himself committed the crime of stealing, the proper inference . . . may be that he received the property knowing, not merely that it had been unlawfully obtained, but knowing that it had been stolen. Such an inference is justified by the fact that by far the commonest way in which property is obtained is by stealing." It is otherwise in the much less common case of property obtained by misdemeanour, where, however, there may be facts in a particular case entitling the court to infer that the receiver knew what in fact had happened to the property—*e.g.*, an association between receiver and "obtainer." "There is no 'doctrine' that in a receiving case where recent possession on the part of the accused is proved he is presumed, in the absence of evidence to the contrary, to have known the facts of the way in which the goods were obtained." [D. C.]

Commentary. In order to convict a man of a crime it must be proved that he caused the *actus reus* of that crime, with the *mens rea* of the same crime. It will generally not do to show that he had the *mens rea* of some other crime, even though that other crime is, as in the present case, of a more serious nature.

The Court for Crown Cases Reserved considered, *obiter*, a similar problem in the famous case of *R.* v. *Prince* (1875) L.R. 2 C.C.R. 154, 171. Under section 50 of the Offences against the Person Act, 1861 (repealed; see now Sexual Offences Act, 1956, s. 5), it was a felony to have carnal knowledge of a girl under ten, and, under section 51 (repealed; see now Sexual Offences Act, 1956, s. 6) a misdemeanour to have carnal knowledge of a girl over ten and under twelve.

Blackburn J. pointed out that if *mens rea* were required for these two offences, we would arrive at "the monstrous result that a man who had carnal connection with a girl, in reality not quite ten years old, but whom he on reasonable grounds believed to be a little more than ten, was to escape altogether. He could not, in that view of the statute, be convicted of the felony, for he did not know her to be under ten. He could not be convicted of the misdemeanour, because she was in fact not above the age of ten." Since the court held that the legislature could not have intended this "monstrous result," and the only way in which it could be avoided was to say that sections 50 and 51 did not require *mens rea* the conclusion followed that these sections created offences of absolute prohibition. It also followed that the section actually in issue in that case, 55, being similarly drafted, also created an offence of absolute prohibition.

This line of escape was not open to the court in the present case since it is, of course, well established that *mens rea* must be proved on a receiving charge. The decision lends point to the criticism made by Dr. Williams (*The Criminal Law*, § 73) of *Prince* that the drafting of sections 50 and 51 of the 1861 Act "could not logically be used to demonstrate that Parliament did not intend to require knowledge of the age. The omission may have been an oversight."

It is submitted, however, that a satisfactory result could properly have been reached in the present case by relying on the concept of recklessness—a course which was not open to the court in *Prince.* When a man receives goods which he knows have been improperly obtained, without inquiring into the precise circumstances in which the goods were obtained, it is, with respect, not true to say that he either knows, or believes that he knows, that they are stolen. The dividing line between obtaining by false pretences and larceny by a trick is sometimes so narrow that it is quite unrealistic to say that a receiver, who has not inquired into the circumstances, knows or believes that the circumstances amount to felony rather than misdemeanour. The truth of the matter surely is that he neither knows nor cares whether they were obtained by felony or misdemeanour. Some writers (*e.g.*, Williams, *The Criminal Law*, § 41 (b)) distinguish between recklessness and a higher degree of culpability, designated "connivance" or "wilful blindness." Even if this more stringent test is applied, it is submitted that there is no reason why N should not have been convicted; for, knowing that the goods had been improperly obtained, he deliberately shut his eyes as to how they had been obtained. This line of reasoning would not avoid the unfortunate result reached in the present case where, unlike the present case, the accused had a real but mistaken belief in the existence of circumstances amounting to felony.

The court said (1) that it is unnecessary to prove that the receiver knew that the property was obtained under circumstances which amount in law to the specific misdemeanour by which they were in fact obtained; (2) it is enough to prove that the receiver knew that the property fell into the general character of property which has been obtained under circumstances which do in law amount to misdemeanour. The second proposition seems to nullify the effect of the first. It will rarely, if ever, be possible to show that a man knew that property was obtained under circumstances amounting in law to a misdemeanour, without showing that he knew the circumstances which amount to the particular misdemeanour by which the property was actually obtained. (It is never necessary to show that the accused knew the law or that he realised that the circumstances amounted to a felony or a misdemeanour as the case may be.)

The "recent possession" rule, as construed in this case, produces somewhat anomalous results. If D is found in possession of goods which have been recently stolen that is prima facie evidence on which he may be convicted. Similarly, therefore, it would seem that he may be convicted if the property was embezzled: for D's belief that the property was stolen (which may be inferred because stealing is by far the commonest way in which property is unlawfully obtained), though erroneous, is still a belief that the property was obtained by felony, which it was; yet he must be acquitted if the property was obtained by false pretences.

The decision adds another item to the list of important consequences which flow from the now outmoded distinction between felonies and misdemeanours, and another occasion for distinguishing between larceny by a trick and obtaining by false pretences. (*Cf.* [1958] Crim.L.R. 92.)

ROAD TRAFFIC

Driving motor-vehicle on a road without a licence or third-party insurance cover—tractor—whether a motor-vehicle

Woodward v. James Young (Contractors) Ltd.

High Court of Justiciary: The Lord Justice-Clerk (Thomson), Lords Mackintosh and Blades: 1958 S.L.T. (Court of Session Reports) 289.[8]

The respondents were charged under section 4 (1) of the Road Traffic Act, 1930, that they employed a person who was not the holder of a licence to drive a motor-vehicle on a road; and under section 35 (1) of the same Act, that they caused or permitted the use of the said vehicle on a road without third-party insurance cover. Section 1 of the Act defines "motor vehicles" as "mechanically propelled vehicles intended or adapted for use on roads." The vehicle in question was a Ferguson motor-tractor of the sort normally used in agriculture. At the time of the alleged offences it was being used by the respondents for the purposes of a road-widening task. In connection with this task, it was driven from time to time upon a short stretch of public highway. The charges were heard and dismissed in the Sheriff Court, the sheriff-substitute being of opinion that the tractor was not a motor-vehicle within the meaning of the Act.

Held, allowing the appeal, the tractor was a motor-vehicle within the meaning of the Act, for it could not be said to be only something in the nature of a farmyard accessory, which was not meant to be on a road: *MacDonald* v. *Carmichael*, 1941 J.C. 27, distinguished. Furthermore, the proviso to section 9 (3) (now replaced by the Emergency Laws (Miscellaneous Provisions) Act, 1953, First Schedule, paragraph 1), which relates to "a tractor used primarily for work on land in connection with agriculture," showed clearly that in the view of the legislature an agricultural tractor was a motor-vehicle, for if that had not been so, there would have been no need for this special exempting provision. [D. Ç.]

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[8] For the appellant: *Grant, Q.C., S.-G.,* and *Skae, A. D.* (instructed by Lionel I. Gordon, Crown Agent).

Commentary. In *MacDonald* v. *Carmichael*, it was held that " Deisel dumpers," which are mechanically propelled vehicles resembling large barrows or tubs, used for the reception and discharge of excavated soil, and designed solely for the conveyance of road construction material, were not vehicles " intended or adapted for use on roads." The distinction seems to be that the tractor, though being used for similar purposes in the present case, was designed to perform a much wider range of functions, including travelling on roads.

SENTENCE

Corrective training — eligibility — offences committed while on probation

R. v. Cox

Court of Criminal Appeal: Lord Parker C.J., Cassels and McNair JJ.: December 15, 1958: *The Times*, December 16, 1958.[9]

C. had pleaded guilty at quarter sessions in June, 1958, to housebreaking and had been placed on probation. During the currency of the probation period C. had committed two further offences for which he had been sentenced to three months' and six months' imprisonment. On being brought back to quarter sessions for breach of probation C. was sentenced to three years' corrective training. At the date of the commission of the original offence C. was not eligible for corrective training, but he became eligible by the commission of the further offences.

Section 8 (5) of the Criminal Justice Act, 1948, provides that: " Where it is proved to the satisfaction of the court by which a probation order . . . was made . . . that the person in whose case that order was made has been convicted and dealt with in respect of an offence committed during the probation period . . . the court may deal with him, for the offence for which the order was made, in any manner in which the court could deal with him if he had just been convicted by or before that court of that offence."

Held, dismissing the appeal, that the question was whether it was correct to sentence a man to corrective training for an offence for which he could not originally have been given corrective training. The point seemed to be entirely covered by section 8 (5) of the Act of 1948 and would be right in principle because when the court passed the sentence it would do so in the light of all the knowledge which the court then had, including the fact that the man had been twice sentenced to imprisonment since being placed on probation. [H. P.]

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[9] The appellant appeared in person. The Crown was not represented.

Commentary. The result is obviously a convenient one and is within the express words of the Act.

Probation order—whether proper to make order concurrent with sentence of detention

R. v. Evans

Court of Criminal Appeal: Lord Parker C.J., Hilbery, Cassels, Barry and Paull JJ.: December 1, 1958: *The Times*, December 2, 1958.[10]

E. had pleaded guilty at quarter sessions in April, 1957, to two offences of storebreaking and had been sentenced to three months in a detention centre on the first count and to two years' probation on the second count. In July, 1958, E. was brought before the quarter sessions for breach of probation and was sentenced to borstal training. He now appealed to the Court of Criminal Appeal against the sentence of borstal training.

Held, that leave to appeal had been granted in this case so that the court might consider whether it was proper to make a probation order concurrently with a sentence of detention: accordingly, the court had extended the time and given leave to appeal also against the order made in April, 1957. It was quite clear that where there was only one offence a court had no power to couple an order for probation with a sentence of three months' detention. By section 3 (1) of the Criminal Justice Act, 1948, a probation order could only be made instead of sentencing the offender, and by section 80 of that Act "sentence" included an order for detention in a detention centre. But the Act did not appear to prevent by express words a probation order being made on a second count instead of a sentence. The court, however, thought that the making of a probation order in such circumstances was contrary to the spirit and intention of the Act. What quarter sessions had done in the present case was really in the nature of providing after-care and, although some provision for after-care in such a case might be highly appropriate, probation was not the proper method to provide it and was wholly inconsistent with an order for detention in a detention centre. The Act made provision for after-care under section 22 in the case of a sentence of imprisonment for two years or more. Further, in the ordinary way a probation order ought to operate forthwith although in the case of a young man in the Services who was due for release in a short time, it might well be proper to make a probation order which would not become fully effective until after his release. This court thought that the proper order in the present case would have been three months' detention on each count to run concurrently and, accordingly, the probation order would be quashed and that sentence substituted. Thus the sentence of borstal training which was imposed for breach of the probation order must also be quashed. [H. P.]

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[10] For the appellant: *Peter Bruce* (instructed by The Registrar, Court of Criminal Appeal). For the Crown: *John Leonard* (instructed by The Solicitor, Metropolitan Police).

Commentary. This case may be compared with *R.* v. *Lewis* (Court of Criminal Appeal: November 17, 1958: unreported) where a finding of breach of probation and the resulting sentence were quashed where the appellant, having been placed on probation by quarter sessions, was convicted at a magistrates' court of another offence and later sent to borstal for breach of probation. Subsequently he obtained leave to appeal to quarter sessions out of time against his conviction at the magistrates' court and that conviction was quashed. The appeal was heard by the Court of Criminal Appeal without any party being present.

SEXUAL OFFENCES

Attempt to commit an act of gross indecency—attempt or mere preparation

R. v. Lawson

Bedfordshire Quarter Sessions: W. W. Stabb, Deputy Chairman: October 21, 1958.[11]

The prisoner was indicted with having attempted to procure an act of gross indecency with a male person (a boy aged ten).

The facts were that on June 23, 1958, the accused approached the boy and had a conversation with him about sex matters, endeavouring to persuade the boy to meet him later and recount any sexual experiences he might have had with his (the boy's) girl-friend, and offering the boy 5s. if he told him of any such experiences. The boy said he would meet the accused that evening, but he did not in fact intend to keep the appointment and he did not do so. Two days later the accused again spoke to the boy and asked him to keep an appointment that evening at 7 p.m., on the edge of the local Downs, and in return for 5s. or 10s. there recount any sexual experiences he had had with his girl-friend. On this occasion the boy, having spoken to the police, kept the appointment.

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[11] For the prosecution: *F. Maurice Drake* (instructed by John Q. Clayton & Co., Luton). For the defence: *T. H. K. Berry* (instructed by Giffen, Couch & Archer, Luton).

The accused led the boy onto the edge of the Downs, out of sight of the road, but within the view of any other people who might happen to walk onto the Downs. The accused lay down and smoked a cigarette and asked the boy various questions about his girl-friend, but the boy replied that he had not really got a girl-friend. The accused asked " Do you shag them? " The boy said no. The accused then asked the boy " Do you play with your winkle? " The boy said he did not like such talk and he walked back to the road.

The accused followed, gave him 5s. saying he had earned it, and again asked the boy sexual questions. The boy walked off, and at that moment the police, who had been watching, arrested the accused. At no time had the accused attempted to touch or interfere with the boy at all.

Held, that on these facts there was no case which could properly be put before the jury. The deputy-chairman said it was always difficult to know exactly where to draw the line between acts which constituted an attempt to commit an offence and those which fell within the field of mere preparation. This case was distinguished from *R.* v. *Miskell* [1954] 1 W.L.R. 438 because, on this evidence, there was no unveiled or undisguised intention which was manifested by overt acts.

[F. MAURICE DRAKE, *Barrister-at-Law.*]

Commentary. Whether the acts alleged by the prosecution are capable of constituting an attempt to commit a crime is a question of law for the judge. Whether the accused did the acts alleged and, if so, with what intent he did them, are questions of fact for the jury.

The distinction between mere acts of preparation to commit crimes which are not, generally, offences, and attempts, which are, is one which has given rise to endless difficulty. *Cf.* Williams, *The Criminal Law*, §§ 143 *et seq.*, and Russell on *Crime* (11th ed.), 189.

In *R.* v. *Miskell* it was held that the accused's conduct was understood to be an invitation to an act of gross indecency, and it was not contended " that an invitation however veiled which in the circumstances is an invitation to commit an act of gross indecency, is not an attempt to procure such an act."

The questions would therefore seem to be: (1) Did the accused intend to invite the boy to commit an act of gross indecency? (*mens rea*); (2) did his acts amount to such an invitation? (*actus reus*). If they were understood by the boy to be such an invitation, that would seem to be convincing evidence that they did. The final sentence of the report seems to indicate that the deputy chairman was not satisfied that there was evidence enabling either of these questions to be answered in the affirmative. The case is not easily distinguishable on the facts from *Miskell.*

It has been pointed out that the police are in a difficult situation in matters of this sort. If they appear on the scene too soon it may be held, as was held to have happened here, that the accused has done nothing beyond the act of mere preparation to commit an offence. If the police wait until the accused has actually done something further they lay themselves open to the criticism that they are almost conniving at the criminal offence.

TRIAL

Plea of guilty to first count—jury who tried second count in court

R. v. Lashbrooke

Court of Criminal Appeal: Lord Parker C.J., Cassels and McNair JJ.: December 15, 1958: *The Times,* December 16, 1958.[12]

L. had been indicted before quarter sessions on three counts. He had pleaded guilty to the first count of shopbreaking and larceny, not guilty to the second count of shopbreaking and larceny and guilty to the third count of shopbreaking with intent. The jury which tried L. on the second count were in the jury box at the time when he pleaded to the indictment. L. was convicted on that count and appealed to the Court of Criminal Appeal on the ground that the jury must have known of L.'s antecedents and also that the jury were not warned to disregard the pleas of guilty. No objection was taken by counsel for the defence at the trial nor was the trial judge invited to give any specific warning to the jury.

Held, dismissing the appeal, that it was quite impracticable to ensure that a juryman knew nothing about the case; he might well have heard the pleas made even if he were at the back of the court and it was idle to suggest that the jury be kept outside the court. Jurors might also have read in the paper of proceedings in the magistrates' court or sentences imposed upon pleas of guilty. A warning need not be given to disregard the accused's antecedents in every case where the jury might have knowledge of the prisoner's antecedents; for in some cases it might do more harm than good by drawing attention to the matter. The position might be different where the jury had already been sworn, as in *R.* v. *Darke* (1937) 26 Cr.App.R. 85. But where a prisoner charged on three counts changed his plea on two counts it could not be suggested that a new jury should be called; although, no doubt, in such a case the jury would be warned to disregard those pleas. Further, in the present case no juryman had been challenged nor had the chairman been invited to give a specific warning to the jury. It was the duty of counsel for the defence to call attention to any irregularity at the trial and, as had been said by Lord Goddard C.J. in *R.* v. *Neal* [1949] 2 K.B. 590 at p. 597, if such an irregularity was not brought timeously to the attention of the court of trial it did not by any means follow that this court would allow advantage to be taken of it. The appeal would accordingly be dismissed. [H. P.]

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[12] For the appellant: *Neil Butter* (in the Court of Criminal Appeal only) (instructed by Messrs. Field Roscoe & Co. for Mr. Keith Moore, Birkenhead). For the Crown: *D. Morgan Hughes* (instructed by Messrs. Kinch & Richardson for Messrs. Percy Hughes & Roberts, Birkenhead).

Commentary. It is certainly true that it is impracticable to ensure that a juryman knows nothing about the case, but the policy of the law has been to ensure that he knows as little as possible about it before he comes into court. It is, therefore, no answer to a case such as that of the present appellant to say that the jurors might have got the information elsewhere. The court has power to exclude jurors in waiting from the court room, so that they should not acquire information about the case they are going to try (*R.* v. *Cook* [1955] Crim.L.R. 792), and in an extreme case a conviction has been quashed because of the newspaper publicity given to the accused's record (*R.* v. *Dyson* (1943) 29 Cr.App.R. 104; *cf.*, however, *R.* v. *Armstrong* (1951) 35 Cr.App.R. 72). The fact that the jury might have learned about the previous convictions elsewhere has not prevented the court from quashing a conviction where the jury have been improperly given a copy of an indictment with the accused's convictions on the back: *R.* v. *Flower* [1957] Crim.L.R. 118, and *cf.* [1957] Crim.L.R. 822.

On the other hand, the failure of counsel to take the objection at the trial was a matter which could hardly be ignored in the present case. At the same time the principle laid down in *R.* v. *Neal* ought, with respect, to be applied with caution; a person should not be punished for the failures of his counsel.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Imprisonment

In R. *v*. WATKINS the court (Lord Parker C.J., Cassels and McNAIR JJ.: December 8, 1958) varied a sentence of three years' corrective training to one of nine months' imprisonment. W. had pleaded guilty at quarter sessions to garage-breaking and larceny. W., who was a man of twenty-three years of age, had eight previous convictions, of which five were of a serious nature. He was first convicted, at the age of ten, of wilful damage. In 1951 he was fined for taking away a motor-vehicle and in the same year he was conditionally discharged for tampering with the mechanism of a motor-cycle. Also in 1951 he was sent to Borstal for shopbreaking. In 1955 he was convicted of stealing two unattended motor cycles and was returned to Borstal. In 1956 he was sentenced to six months' imprisonment for storebreaking and larceny; and in the same year he was given one month's imprisonment for dangerous driving and driving without a licence or insurance. His last conviction was in January, 1957, when he was given twelve months' imprisonment for housebreaking and taking away a motor-vehicle (four other offences being taken into consideration). He was released from prison in September, 1957. The facts of the present case were that—apparently to appease his wife who said that he was not paying enough attention to her—he broke into a garage and took away a car; he returned the car after taking his wife for a ride. The court stated that the offence was a comparatively trivial one which, in the opinion of the court did not merit three years' corrective training although W. had a bad record. The proper sentence was nine months' imprisonment.

In R. *v*. NEWMAN the court (Lord Parker C.J., Cassels and McNAIR JJ.: December 8, 1958) reduced a sentence of twelve months' imprisonment to one of nine months' imprisonment on the ground that N. had been in prison awaiting trial for a long period.

In R. *v*. RHODES the court (Lord Parker C.J., Cassels and McNAIR JJ.: December 15, 1958) upheld a sentence of twelve months' imprisonment. R. had pleaded guilty at quarter sessions to forgery. R., who was a man of forty-six years of age, was previously of good character. The offence was committed when R., who was the occupier of a council house, forged a certificate of wages in order to qualify for a rebate of rent based on his earnings. The court stated that it seemed clear that the recorder had been minded deliberately to make an example of R. and of two other men in similar cases. This court could see no ground to interfere with the sentence.

In R. *v.* LASHBROOKE (reported as to appeal against conviction, *ante*, p. 136) the court reduced the sentence from four years' imprisonment to two years' imprisonment.—L. was a man of fifty years of age with a number of previous convictions. The court stated that, although L. had a bad record, he had only one conviction since 1943 and that was for an offence not involving dishonesty, namely bankruptcy. In the circumstances the proper sentence was one of two years' imprisonment.

Corrective training

In R. *v.* EVANS AND TWIST the court (Lord Parker C.J., Cassels and McNair JJ.: December 8, 1958) reduced sentences of four years' corrective training to sentences of three years' corrective training in each case. E. and T. had pleaded guilty at a magistrates' court to larceny and had been sentenced by quarter sessions. E. and T. were men of thirty and twenty-five years of age respectively; and E. had three previous convictions (for larcenies, burglaries and storebreakings) and T. had six previous convictions (including a sentence of Borstal and two years' imprisonment for burglary and storebreaking). The present offence was stealing 2s. 10d. from an offertory box in a church. The court stated that the appellants' records fully justified a sentence of corrective training and the court could see nothing wrong in principle with the sentences imposed. However, the court understood that these prisoners would go for training to a prison based on a two years' training period, that is, three years less remission, and in those circumstances the court would reduce the sentences to three years' corrective training in each case.

In R. *v.* CAPPER the court (Lord Parker C.J., Cassels and McNAIR JJ.: December 15, 1958) varied a sentence of three years' corrective training to one of three years' imprisonment. C. had pleaded guilty at a magistrates' court to larceny and had been sentenced by quarter sessions. C., who was a man of thirty-one years of age had sixteen previous convictions. The prison commissioners, after summarising C.'s history, concluded their report by saying: "The prisoner's failure to respond to previous training and his record suggest that he would not profit from further training." The court stated that, as this court had previously said on many occasions, where the prison commissioners reported that a man was so far advanced in crime that he would be most unlikely to benefit from corrective training, then corrective training should not be imposed. It was perfectly clear that that was the position in this case and accordingly the court would substitute a sentence of three years' imprisonment.

It was held in R. *v.* Cox (reported *ante*, p. 132) that corrective training can be imposed in respect of breach of probation although at the time when the offender was put on probation he did not qualify for corrective training.

Borstal training

In R. *v.* MILLS the court (Lord Parker C.J., Cassels and Barry JJ.: December 1, 1958) varied a sentence of Borstal training to one of detention in a detention centre. M. committed offences, whilst on probation, for which he was sentenced to three months' detention in a detention centre. On being brought up for breach of probation he was sentenced to Borstal training. The court stated that the sentence of Borstal training was wrong in principle. As had been said in R. *v.* SMITH [1957] Crim.L.R. 457: "To be sent to a detention centre is a very good way of dealing with some of these boys who are not really fit for Borstal at the time or are of such character that they ought not to be sent to Borstal, but this court has before now said that if a boy has been sent to a detention centre it is not right to send him to Borstal for an offence committed before he was sent to the detention centre." This court would accordingly impose a sentence of three months in a detention centre to run concurrently with the orders originally imposed. As M. had served his sentence he would, therefore, be discharged.

Probation

In R. *v.* BESTFORD the court (Lord Parker C.J., Cassels and McNAIR JJ.: December 8, 1958) substituted a probation order for a sentence of ten years' preventive detention. B. had pleaded guilty at quarter sessions to breaking into a school and had asked for five other offences to be taken into consideration. B., who was a man of thirty-eight years of age, had seventeen previous convictions. The court stated that this was an extraordinarily difficult case. B. had had every kind of sentence from a fine to eight years' preventive detention. It was, however, to be observed that B. had worked well on his release from preventive detention and had co-operated with the probation officer. It was the opinion of the probation officer that, if B. were now to be treated leniently, there was an outside chance that he could make good. The court, after anxious consideration, were prepared to take that outside chance and would, accordingly, make a probation order for three years.

As to making a probation order currently with a sentence of detention in a detention centre, see R. *v*. EVANS (reported, *ante*, p. 133).

Acts and Orders [*]

Animals

Subject to observance of various conditions and safeguards it is now permissible to use carbon dioxide gas as an anaesthetic during the slaughtering of pigs. The regulations are made under the provisions of section 1 of the Slaughter of Animals Act, 1933, section 2 of the Slaughter of Animals (Amendment) Act, 1954, and section 8 of the Slaughterhouses Act, 1958. (See now Slaughter of Animals Act, 1958, below.) Operative December 1, 1958. SLAUGHTER OF PIGS (ANAESTHESIA) REGULATIONS, 1958 (S.I. No. 1971) (3d.).

For penalties for contraventions see Regulation 14 of these Regulations.

The Slaughter of Animals (Prevention of Cruelty) (No. 2) Regulations, 1954 (S.I. No. 1584), as amended, are re-enacted with certain modifications and additions. The principal new provisions are (1) for the slaughter of adult cattle the provision and use of stunning pens is made compulsory. This requirement will not come into force for existing slaughterhouses until dates to be appointed, but otherwise comes into force immediately (reg. 5); (2) special precautions are to be taken with horned cattle and fractious animals in lairages (reg. 10); (3) animals must not be kept in fields awaiting slaughter when conditions are severe (reg. 11); (4) local authorities may make licences for new slaughtermen conditional upon their slaughtering only under supervision by someone more experienced (reg. 19). In addition, provision is made for the ending, after suitable periods, of exemptions from two of the 1954 requirements in relation to certain existing premises (regs. 15 and 28). The regulations are to be enforced and executed by local authorities. Operative January 1, 1959. SLAUGHTER OF ANIMALS (PREVENTION OF CRUELTY) REGULATIONS, 1958 (S.I. No. 2166) (6d.).

For penalties for contraventions see section 5 of the Slaughter of Animals Act, 1958, and regulations 36 and 37 of these Regulations.

SLAUGHTER OF ANIMALS ACT, 1958 (7 Eliz. 2, c. 8) (8d.) Operative January 18, 1958. The following enactments are consolidated:

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[*] Prepared by F. Maurice Drake, *Barrister-at-Law.*

Slaughter of Animals Act, 1933 (23 & 24 Geo. 5, c. 39); Slaughter of Animals (Pigs) Act, 1953 (1 & 2 Eliz. 2, c. 27); Slaughter of Animals (Amendment) Act, 1954 (2 & 3 Eliz. 2, c. 59); Slaughterhouses Act, 1958 (6 & 7 Eliz. 2, c. 70).

For penalties for contraventions see section 5 of the Act.

See also SCOTLAND, p. 149, *post*.

Armed Forces

MANOEUVRES ACT, 1958 (7 Eliz. 2, c. 7) (9d.). Operative December 18, 1958. Various enactments relating to defence manoeuvres have been consolidated; they are the Military Manoeuvres Acts, 1897 and 1911 (60 & 61 Vict. c. 43, and 1 & 2 Geo. 5, c. 44); Special Roads Act, 1949 (12, 13 & 14 Geo. 6, c. 32); Magistrates' Courts Act, 1952 (15 & 16 Geo. 6 & 1 Eliz. 2, c. 55), and Lands Powers (Defence) Act, 1958 (6 & 7 Eliz. 2, c. 30). By section 8 (1) it is an offence if, within a manoeuvres area and while manoeuvres are taking place any person (*a*) wilfully or unlawfully obstructs or interferes with the execution of the manoeuvres, or (*b*) without authority enters or remains in any camp; or by section 8 (2) (*a*) without authority moves any flag or other mark used in the manoeuvres, (*b*) maliciously cuts or damages any telegraph wire laid down by or for the use of the forces, or (*c*) erects or displays any notice or mark on or relating to any land or source of water in the area in any way other than that authorised by the Act.

For penalties for contraventions see section 8 of the Act.

Attendance Centres

The Rules of 1950 (S.I. No. 712) are revoked and replaced. The principal change is that the revoked rules applied only to attendance centres for boys of between twelve and seventeen years of age when the attendance centre order is made, whilst these new Rules apply to all attendance centres for male persons. Under section 19 of the Criminal Justice Act, 1948, an attendance centre order can be made in the case of any person of between twelve and twenty-one years of age when the order is made. Operative December 1, 1958. ATTENDANCE CENTRE RULES, 1958 (S.I. No. 1990) (3d.).

Children

ADOPTION ACT, 1958 (7 Eliz. 2, c. 5) (2s. 6d.); operative April 1, 1959. The following Acts, or parts of them, are consolidated and where necessary revoked, wholly or partially: Adoption Act, 1950; Magistrates' Courts Act, 1952; Friendly Societies Act, 1955; Children Act, 1958. The following sections deal with offences and prescribe the penalties for contraventions of the Act: section 29 (restriction on making arrangements for adoption); section 32 (power of Secretary of State to make regulations under the Act, and penalties for contraventions thereof); section 33 (inspection of books, etc., of registered adoption societies); section 44 (offences under Part IV, which provides for the supervision of children awaiting adoption or placed with strangers); section 50 (prohibition of certain payments); section 51 (restriction upon advertisements); section 52 (restriction on removal of infants for adoption outside British Islands); section 54 (offences by bodies corporate).

Coast Protection

The Coast Protection Act, 1949 (12 & 13 Geo. 6, c. 74) makes provision for the protection of certain parts of the coast of Great Britain against erosion and encroachment and prohibits certain works detrimental to navigation. The Fourth Schedule to the Act excludes certain waters for the purposes of the definition of "sea" and "seashore" in the Act, but provides that the Schedule may be varied either by adding waters to it or removing them from it. These Regulations vary the Schedule by removing from it certain waters in the areas of Brightlingsea Creek and St. Osyth Point; the River Colne above a line drawn between Viaduct Sluice to the west of Bateman's Tower and Mersea Stone; and the River Exe above a certain latitude. Operative December 23, 1958. COAST PROTECTION (VARIATION OF EXCLUDED WATERS) REGULATIONS, 1958 (S.I. No. 2146) (2d.).

For penalties for contraventions see section 43 of the Coast Protection Act, 1949.

Continuance of Offences

EXPIRING LAWS CONTINUANCE ACT, 1958 (7 Eliz. 2, c. 4) (4d.): operative December 18, 1958. The following Acts or parts of Acts which are temporary in their duration are continued in force for a further twelve months (1) from December 31, 1958: Section 1 of the Aliens Restriction (Amendment) Act, 1919; the whole of the Population (Statistics) Act, 1938; Education (Exemption) (Scotland) Act, 1947; Tenancy of Shops (Scotland) Act, 1949; Accommodation Agencies Act, 1953; (2) from March 31, 1959: the whole of the Rent of Furnished Houses Control (Scotland) Act, 1943; Furnished Houses (Rent Control) Act, 1946; and Part II of the Licensing Act, 1953.

Customs and Excise

The Export of Goods (Control) (Consolidation) Order, 1958, (S.I. No. 617) is amended, the principal amendments being (1) that export control is removed from a considerable list of goods irrespective of the destination for which they are intended; (2) that export control is removed from certain specified machines for the production of aircraft and aircraft engines, if they are destined for countries specified in Article 4 (*a*) of the principal Order; (3) that the provision in Article 4 (*b*) of the principal Order permitting the export by registered letter post, insured box post or air freight, of uncounted cut and polished diamonds to any destination, or by insured parcel post to territories scheduled under the Exchange Control Act, 1947, is extended to include all unmounted diamonds; (4) that export control is imposed on the export (*a*) to all destinations of telemetering and telecontrol equipment for aircraft, large diesel engines and electric motors designed for submarines; and (*b*) to countries other than those specified in Article 4 (*a*) of the principal order of *ρ*-Nitromethylaniline and fork and other lift trucks built to military specifications; (5) that the entry of Group 6 (4) of the First Schedule relating to ball and roller bearings has been re-drafted to clarify the position of needle rollers and needle roller bearings. Operative December 1, 1958. EXPORT OF GOODS (CONTROL) (AMENDMENT NO. 4) ORDER, 1958. (S.I. No. 1937) (4d.).

For penalties for contraventions see section 3 of the Import, Export and Customs Powers (Defence) Act, 1939.

Elections

REPRESENTATION OF THE PEOPLE (AMENDMENT) ACT, 1958 (7 Eliz. 2, c. 9) (3d.): operative January 18, 1958. Section 88 of the Representation of the People Act, 1949, which made it illegal for more than a limited number of motor vehicles to be used at a parliamentary election on behalf of a candidate, has been repealed. There is now no limit or restriction on the number of motor-cars which may be used on behalf of a candidate at local or parliamentary elections.

Employment

The prohibition of Sunday employment laid down in section 77 of the Factories Act, 1937, did not apply to women employed in factories in the manufacture of bread or flour confectionery (including meat and fruit pies but not biscuits) or sausages on Sunday, December 21, 1958, in England and Wales; and on Sundays, December 21 and 28, 1958 in factories in Scotland in the manufacture of meat pies or sausages. SUNDAY BAKING AND SAUSAGE MAKING (CHRISTMAS AND NEW YEAR) ORDER, 1958. (S.I. No. 1989) (3d.).

Food

Food

Provision is made for the sale and importation of apples, pears, pineapples, peaches and melons, and articles of food containing any such fruit which contain ortho-phenylphenol within prescribed limits: operative December 24, 1958 in England and Wales and December 31, 1958 in Scotland. PUBLIC HEALTH (PRESERVATIVES, ETC., IN FOOD) (AMENDMENT NO. 2) REGULATIONS, 1958; (S.I. No. 2167) (3d.); (SCOTLAND) (S.I. No. 2217) (3d.).

Slaughterhouses

Regulations made jointly by the Minister of Agriculture, Fisheries and Food and the Minister of Health, in relation to new slaughterhouses, are designed to secure the observance of sanitary and cleanly conditions in connection with the construction and operation of slaughterhouses and the handling of meat therein. Requirements are imposed upon the occupiers of slaughterhouses as to the construction, layout, drainage, equipment, maintenance, cleanliness, ventilation, lighting, water supply, management and personal hygiene. These requirements are operative January 1, 1959; and other requirements relating to diseased animals and meat and the lighting of slaughterhouses are to come into operation in respect of existing slaughterhouses on dates to be appointed by the Minister. The Regulations are to be enforced and executed by local authorities. SLAUGHTERHOUSES (HYGIENE) REGULATIONS, 1958 (S.I. No. 2168) (6d.).

For penalties for contraventions see section 106 of the Food and Drugs Act, 1955 and Regulation 45 of these Regulations.

London

Changes are made in the scale of fares which are payable for the hiring of a motor-cab in the Metropolitan Police District and the City of London. The basic scale of fares is that specified in paragraphs 40 and 41 of the London Cab Order, 1934, as set out in the London Cab (No. 2) Order, 1951 (S.I. No. 1352). The

London Cab (No. 2) Order, 1957 (S.I. No. 1620) made provision for a surcharge of 6d. for each hiring when a prescribed form of notice was displayed in the cab. By Article 1 of this Order the hiring charge to be recorded on the meter is increased from 6d. to 1s. and the Order of 1957 is revoked. (Art. 3). Paragraph (*b*) of the proviso makes provision for a surcharge of 6d. in cases where the taximeter cannot record the new scale of fares. Article 2 provides for an extra charge of 1s. payable in respect of any hiring commencing or terminating between midnight and 6 a.m. It is an offence under the principal Acts, the Metropolitan Public Carriage Act, 1869, to charge more than the authorised scale: operative January 1, 1959. LONDON CAB ORDER, 1958 (S.I. No. 2148) (3d.).

For penalties for contravention see section 10 of the Metropolitan Public Carriage Act, 1869.

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 2001 (Harrow) (2d.); 2002 (Paddington) (2d.); 2134 (Islington) (3d.); 2193 (Surbiton) (2d.); 2065 (Hampstead) (2d.).

Magistrates' Courts

Rule 1 of these rules prescribes the terms to be used in cases where a magistrates' court has made an attendance centre order under section 19 of the Criminal Justice Act, 1948, in the case of a person who appears to the court to have attained the age of seventeen years. Rule 2 makes provision, in cases where such an order has been made in default of the payment of a sum of money, about subsequent payment of the sum. Operative December 1, 1958. MAGISTRATES' COURTS (ATTENDANCE CENTRE) RULES, 1958 (S.I. No. 1991) (4d.).

The Maintenance Orders Act, 1958 (6 & 7 Eliz. 2, c. 39), is to come into operation on February 16, 1959. MAINTENANCE ORDERS ACT, 1958 (COMMENCEMENT) ORDER, 1958 (S.I. No. 2111) (2d.).

The Metropolitan Police Courts (Domestic Proceedings) Orders, 1952 (S.I. No. 1860); 1953 (S.I. No. 396); and 1958 (S.I. No. 421), are revoked and consolidated with amendments, the principal of which is that the magistrates' court which hears domestic proceedings for the City of London and the metropolitan stipendiary court area under the Order will sit on Thursdays, as well as Tuesdays, at Walton Street, Chelsea, instead of on Thursdays at Bow Street. Operative January 1, 1959. METROPOLITAN MAGISTRATES' COURTS (DOMESTIC PROCEEDINGS) ORDER, 1958 (S.I. No. 2181) (3d.).

Poisons

Certain substances are added to the Poisons List. Certain of the items added comprise substances already in the list and the separate entries relating to these substances are therefore now omitted. The Poisons List Order, 1953 (S.I. 1953 No. 1300), is further amended accordingly. Operative January 1, 1959. POISONS LIST (No. 2) ORDER, 1958 (S.I. No. 2122) (3d.).

Various further amendments are made to the Poison Rules, 1952 (S.I. No. 2086). The principal changes are that paragraph 1 of the Schedule makes some relaxation of the requirements as to the contents of prescriptions required for certain medicines when those medicines consist of preparations contained in the British National Formulary; and paragraph 5 (*a*) enables listed sellers of poisons to sell calcium arsenates in the form of preparations for use in agriculture or horticulture generally instead of only as insecticides and fungicides. The remaining paragraphs of the Schedule make appropriate alterations consequential upon the making of the Poisons List (No. 2) Order, 1958 (S.I. No. 2122)—see above—and impose restrictions and requirements regarding substances now added to the Poisons List by that Order. Operative January 1, 1959. POISONS (No. 2) RULES, 1958 (S.I. No. 2123) (3d.).

For penalties for contravention see section 24 of the Pharmacy and Poisons Act, 1933.

Road Traffic

The use of the Preston By-Pass Motorway is regulated. The traffic which may use this special road has already been specified by the Special Roads (Classes of Traffic) Order, 1958 (S.I. No. 1280; [1958] Crim.L.R. 703). These Regulations provide that except in certain specified cases (a) vehicles are to be driven on the carriageways only (Reg. 4); (b) one-way driving is to be observed by vehicles using the carriageways (Reg. 5); (c) vehicles are not to stop (Reg. 6) or be driven backwards (Reg. 7); (d) vehicles may stop on the verges only to the extent permitted by Regs. 6 (2) and (3) (Reg. 8); (e) vehicles are not to be driven on or to remain at rest on the central reservation (Reg. 9); (f) vehicles are not to be driven by learner-drivers (Reg. 10); (g) persons on foot on the motorway are not to be on the carriageway or on the central reservation (Reg. 11); (h) animals carried in a vehicle are as far as practicable to be kept in the vehicle or, if they are not in the vehicle, are not to go or remain on any part of the motorway other than a verge and are to be kept under proper control (Reg. 12). Regulation 13 provides that certain traffic normally not permitted to use the motorway may do so in case of emergency or on special occasions which are specified. Regulation 14 provides for certain general exceptions from the provisions of the Regulations and authorises the Minister to relax any prohibition or restriction imposed thereby. Operative from the opening of the motor way. PRESTON BY-PASS MOTORWAY TRAFFIC REGULATIONS, 1958 (S.I. No. 1983) (4d.).

For penalties for contraventions see section 12 of the Special Roads Act, 1949.

Scotland

The Tuberculosis (Attested Herds) Scheme, 1950 (S.I. No. 1126), is revoked so far as it applies to Scotland, and re-enacted with amendments: The principal changes are: (1) in the event of non-observance of the Scheme by an owner of an Attested or Supervised Herd, the Secretary of State now has discretion to reduce the amount of bonus in respect of that herd; (2) provision is made for the fixing by the Secretary of State of a new date from which the bonus period is to be calculated when two Attested or Supervised Herds are combined; (3) claims for capitation bonus are to be made within three months of the June and December statutory return dates; (4) capitation bonus in respect of animals acquired for addition to an Attested or Supervised Herd, which are isolated pending an official tuberculin test, will be payable only to owners of herds attested or supervised under the 1950 Scheme. Notwithstanding the revocation of the 1950 Scheme it is provided that existing Attested Herds and Supervised Herds shall be treated as such for the purposes of the present Scheme, but the period during which bonus is payable in respect of them under this Scheme is reduced by the length of the period during which bonus was payable under the revoked Scheme.

It is an offence under section 7 of the Diseases of Animals Act, 1950 (14 Geo. 6, c. 36), for any person knowingly or recklessly to make any false statement for the purpose of obtaining for himself or any other person any sum payable under the provisions of the Scheme. For a similar Scheme applying to England and Wales see S.I. No. 1912; [1959] Crim.L.R. 65. Operative December 1,

1958. TUBERCULOSIS (ATTESTED HERDS) (SCOTLAND) SCHEME, 1958 (S.I. No. 1967) (6d.).

For penalties for contraventions see section 7 of the Diseases of Animals Act, 1950.

The scales of pay of police inspectors, sergeants and constables in Scotland, and the rates of defective duty allowance, are increased with effect from April 22, 1958. Special provision is made regarding the increments of sergeants who were promoted to that rank on or after April 23, 1955, and before April 22, 1958; sergeants in either their first or second year of service in that rank at April 22, 1958, will enter the new scale as at that date at the commencing point, and sergeants so entering the new scale during the first year of service in that rank will not qualify to move to the next point in the scale until April 22, 1959, nor to the final point until April 22, 1960. Operative December 4, 1958. POLICE (SCOTLAND) AMENDMENT REGULATIONS, 1958 (S.I. No. 2009) (3d.).

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of readers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

53. *Insurance—use of combination with side-car attached*

I refer to the practical problem at [1958] Crim.L.R. 705 and letter from Cambrian at page 767 which dealt with the above subject. At page 706 you gave your opinion that the machine in question was being used when uninsured.

I would refer you to *Carnill* v. *Rowland* [1953] 1 W.L.R. 380, D.C., where the respondent held a cover note for third-party insurance limited to motor-cycle (with side-car permanently attached). He removed the body of the side-car and drove the vehicle on a road, there being attached to the motor-cycle only the side-car chassis and the wheel. The insurance company in this case considered themselves on "risk."

It was held that as the company considered itself on "risk," and the side-car chassis and wheel could possibly be said to constitute a side-car, the respondent was insured against third-party risks.

I cannot reconcile your answer at page 706 with the decision in the case *Carnill* v. *Rowland*. The case quoted by you, *Bright* v. *Ashford* [1932] 2 K.B. 153, is an earlier decision and the decision in the 1953 case appears to overrule *Bright* v. *Ashford*. [L. S.]

ANSWER

I agree that *Carnill* v. *Rowland* [1953] 1 W.L.R. 380, D.C., is a very relevant decision and I am grateful that my attention has been drawn to this case. The conclusion stated on the practical problem at [1958] Crim.L.R. 705–706, is open to query in the light of this decision; but I do not agree that *Bright v. Ashford* [1932] 2 K.B. 153 has been overruled by it; at the most *Bright* v. *Ashford* has been distinguished on the particular facts of *Carnill* v. *Rowland*.

In *Bright* v. *Ashford* the side-car had been completely removed, and in view of the condition in the insurance policy that the vehicle was only covered whilst a side-car was attached it was held that the accused had been rightly convicted. This decision has never been questioned and is certainly *not* overruled by *Carnill* v. *Rowland*; nor would it have made any difference to *Bright* v. *Ashford* if the insurers concerned had stated that they considered themselves bound; for in the complete absence of any side-car or chassis the insurers were quite clearly not liable in law to indemnify the user if damage resulted from the use of the vehicle without a side-car. To put this in another form, on the facts of *Bright* v. *Ashford* it is clear that the insurers could not have been *compelled* to pay out on the policy.

In *Carnill* v. *Rowland* the side-car had not been completely detached for the chassis and side-wheel were left on, *i.e.*, it was only the cockpit part of the side-car which had been removed. The justices took the view that the chassis and wheel might reasonably be called a " side-car." Thus there was a genuine doubt as to the construction and true meaning of the word " side-car," and the justices accepted the view of the insurers, a responsible company, that the machine was considered by the insurers to be covered. The Divisional Court upheld the justices' decision, making it clear that no offence was committed where (i) there might be some reasonable doubt on the words used in the policy as to whether or not the machine was insured, and (ii) the insurers concerned satisfied the court that they had considered themselves bound to pay out in the event of a claim being made. The court emphasised that if there could be no doubt about the matter (as was the case in *Bright* v. *Ashford*, where there was nothing at all which it could be agreed constituted a " side-car ") then the views of the insurers could not be relevant one way or the other.

Thus the conclusion stated in the practical problem at [1958] Crim.L.R. 705–706 should be modified. Theoretically the accused could still only be acquitted if the insurers gave evidence that they would have accepted that the machine was covered by the policy. But I think that in practice, and most certainly if the insurers concerned were a responsible company, no court would convict the accused on what appear to be identical facts to those in *Cornill* v. *Rowland* above. [M. D.]

Letters to the Editor

Prosecuting Officer

Sir,

Your article "Prosecuting Officer" is one of considerable interest, but it must be appreciated that a police officer has no right in law to undertake a prosecution unless he be legally qualified. Of course, the Chief Constable, the complainant in a case, can conduct the prosecution himself, but this authority cannot be delegated to any person other than a solicitor or barrister. In fact in this city some 15 years ago the point was taken in the court, and caused very considerable difficulty. So long as the defence does not object, a police officer may prosecute, but only on the understanding that if the objection be taken at any time, only a complainant police officer may in fact prosecute in person.

Yours faithfully,

SILVERMAN AND LIVERMORE.

Liverpool.

[Mr. Williams writes: "I do not think that your correspondent and I really differ very much in our views (excepting that I prefer to follow the Act and use the term "informant" in this connection, and confine the term "complainant" to non-criminal proceedings). I would, however, dispute his opening sentence to the effect that a police officer has no right in law to undertake a prosecution unless he be legally qualified. But your correspondent himself cannot really have meant this, because in his next sentence he speaks of the right of the Chief Constable, if a complainant, to conduct the prosecution himself.

And of course, as I tried to make clear in the article, the authority of a police officer to conduct the prosecution does depend on his being the informant, and not on his being either a Chief Constable or the "officer in the case." Your correspondent is perfectly right to say that the Chief Constable, if a complainant in a case, cannot delegate this authority. Apart from the fact that many Chief Constables nowadays may not be able to find time to conduct prosecutions, the conduct of prosecutions by subordinate officers has to be achieved, not by a pretended delegation, but merely by showing some other designated officer as the informant. The point on which forces differ is, who is to be so designated. In one large force, for instance the "officer in the case" (*i.e.,* the officer who has reported the case) is normally the informant, though his conduct of the prosecution is usually purely notional. In others a Headquarters officer may sometimes be appointed to be Prosecuting Officer for the force, spending his whole time in preparing and conducting prosecutions. In yet other forces, and this will include some County Forces, a compromise is reached by arranging for the senior police officer in a court area to be the informant in all prosecutions before his court. Among the advantages claimed for this method are that, on the one hand, this ensures a uniformly high standard of presentation, and, on the other hand, it avoids the possible tendency towards specialisation that may be found where an officer does nothing else but conduct prosecutions."]

R. v. Auton

Sir,

An amendment should be made to my note on *R.* v. *Auton* at [1958] Crim.L.R. 549. I have had some correspondence with Mr. Jaye, of Foster, Wells and Coggins, the prosecuting solicitor in that case. He makes two observations on the suggestion that it is better practice in relation to a notice under section 43 (1) (*b*) of the Larceny Act, 1916, either to state in the notice an intention to prove the previous conviction " at the trial " (instead of a more particular form of words) or to serve two separate notices in respect of the committal proceedings and of the trial at Quarter Sessions.

His observations are: that if the notice uses the words " at the trial," it might be held ineffective in relation to the committal proceedings on the ground that such proceedings are not " the trial "; and, secondly, that the trial may be held too soon after the committal for a fresh notice to be served in time. It seems that there is a valid objection to each of the courses suggested. I understand that a notice is fairly often served referring only to " the trial "; perhaps another form of words should be found.

It is submitted that the difficulties will be met if some such form of words as " in the proceedings against you " is used: this is related to the wording of the statute. Alternatively, if one wishes to be more particular, the notice might state an intention to prove the conviction " at the trial and at any hearing preliminary thereto."

Yours faithfully,

CHARLES FAY.

Temple.

Books and Periodicals

Reviews:

Foul Deeds Will Rise. By Richard Harrison. London: John Long. 1958. 175 pp. and (index) 3 pp. (16s. net.)

At first sight, this is a very difficult book to commend. It appears to be little more than a miscellany of cases told in an exceedingly brief manner and many of them have reached the stage where they can only be described as hackneyed.

The seven themes, on each of which Mr. Harrison pegs anything from three to nine of his anecdotes, do not appear to have a great deal to recommend their selection.

Nevertheless, there is something intriguing about this collection and it is a book very hard to put down.

It may be that it is the crisp, matter-of-fact manner in which the stories are told. There is certainly not a word wasted and we are spared the sentimental poring over the technique of advocacy in which so many of these selections indulge.

It may be that after many years of reading more detailed and technical accounts, these lively pieces come as a welcome relief. It certainly is exhilarating to be transported from the detail of a case in the nineteen-fifties to another of the seventeenth century in the course of the same page.

One can imagine that these stories are the type of light material the author makes use of on his lecture tours. It is a pity that he has over-dramatised his American studies and surprising that he found so few of the fair sex for his chapter on " Women on Trial."

For all that, a man who can introduce the cases of Haigh and Camb into a collection of this type without sending a reviewer into something approaching epilepsy, must be commended!

HUGH DUDLEY.

Keep Them Out of Prison. By R. A. F. Cooks. London: Jarrolds. 1958. 185 and (index) 4 pp. (16s. net.)

With the passing of the Criminal Justice Act, 1948, there came extended official encouragement for projects intended to reform young offenders without recourse to prison. Clearly some young men and women could benefit from leniency although they needed more support than was possible where the court made a probation order without a condition of residence. For such lads—burdened with defective and inadequate homes, or lacking stability of character and in need of some training—a hostel was opened at Leicester. The author relates his experiences as its warden.

Mr. Cooks had previously been a probation officer. He presents a refreshing account of the successes and failures of those in his care. Each lad needed an individual approach, and suitable work had to be found in the locality for all. They returned to the hostel each evening, staying in this disciplined yet kindly community for a period of up to twelve months. With an abundance of case history, and from a wealth of experience, Mr. Cooks emphasises the fact that careful selection by the courts of those offenders they send to such a hostel, is the keynote of success.

JEAN GRAHAM HALL.

Books received:

Youthful Offenders at Highfields: An Evaluation of the Effects of the Short-term Treatment of Delinquent Boys. By H. Ashley Weeks. U.S.A.: University of Michigan Press. 1958. 208 pp.

Law and Practice of Hurt and Homicide. By P. J. Rust. 3rd ed. by K. Venkoba Rao. Allahabad Law Book Co. 1958. 719 and (index) 41 pp.

Readers' digest:

False imprisonment: 102 *Solicitors' Journal* 890.

Fraud: International tricksters: *International Criminal Police Review* No. 122, p. 258.

Fraud: Marked cards and loaded dice: *Spring 3100*, (Journal of the New York City Police) Vol. 29, No. 10, p. 6.

Fraud: Obtaining credit: 226 *Law Times* 301.

Magistrates' courts: Plea of guilty in writing: 109 *Law Journal* 4.

Parties: The Second Degree Principle: 66 *Police Review* 860.

Prisons: The First New Prison, Everthorpe: *Architects' Journal*, December 4, 1958.

Sentence: Borstal training, Prison Commissioners' Report: 226 *Law Times* 334.

Sentence: Discretionary sentences: 227 *Law Times* 4.

Shops: Mobile shops: 122 *Justice of the Peace* 839.

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THE
CRIMINAL LAW
REVIEW

March 1959

Penal Practice in A Changing Society [1]

Hard upon the publication in our February issue of the first of Dr. Glanville Williams' articles on law reform comes the Government White Paper on crime and punishment, containing, among other things, a proposal to set up a Standing Committee on Criminal Law Revision under the chairmanship of Lord Justice Sellers.

The White Paper states that the Committee is to be set up—

> "In order that those deserving punishment shall not escape owing to defects in the criminal law,"

and the first major topic for consideration will be the law of larceny and related forms of fraud. The Committee is also being asked to consider defects in the law relating to indecent behaviour towards children, not amounting to indecent assault.

While we are pleased to hear that an effort is being made to fill the many gaps in the substantive criminal law, we hope that the *raison d'être* for the Committee as given above will not limit its activities to substantive law alone. There are a number of aspects of criminal procedure and administration, for example, the law of arrest, where consolidation and revision would be desirable. The full terms of reference of the Committee lead us to hope that these problems will not escape their notice. They are:

> "To be a standing committee, to be known as the Criminal Law Revision Committee, to examine such aspects of the criminal law as the Home Secretary may from time to time refer to the Committee, to consider whether the law requires revision, and to make recommendations."

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[1] Cmnd. 645, H.M.S.O. (2s. 6d.).

At page 183, *post*, we publish a consideration of some aspects of the White Paper by Dr. T. E. James, and some police notes on it by Mr. Christopher Williams.

As regards the penal system, Dr. James considers in detail the proposals regarding male offenders between the ages of sixteen and twenty-one, where the greatest amount of innovation is being introduced. The White Paper also gives details of the prison building programme and refers to the problems of prison activities, psychiatric and psychological services, discharge and after-care and recruitment and conditions of the Prison Service. Research projects on subjects relating to penal reform which are being undertaken by the Home Office and the universities are also listed and commented on.

We note particularly in the section on the development of penal methods the setting up of a working party to consider the late Miss Margery Fry's proposals for a scheme for compensating the victims of criminal violence. This scheme is based on the view that the obligation to the victim of crime rests primarily on the society which failed to protect him against it:

> "The assumption that the claims of the victim are sufficiently satisfied if the offender is punished by society becomes less persuasive as society in its dealings with offenders increasingly emphasises the reformative aspects of punishment."

We agree, and hope that the working party will be able to reach some solution to the problem posed by this change in emphasis and that they will not disregard the possibility of exacting contributions from offenders where this is possible.

The Government hope that they will be able to plot their course of administering the penal institutions during the coming years with this White Paper as their chart. Whether it will serve that purpose remains to be seen, but the care with which it has been prepared will ensure that it serves the other purpose mentioned in its concluding paragraph, that of stimulating informed discussions of the intractable problems that have to be solved.

Criminal Law Revision Committee

The members of the Criminal Law Revision Committee are as follows:

Lord Justice Sellers, Chairman; Mr. Justice Devlin; Mr. Justice Donovan; Professor D. R. Seaborne Davies, Pro-Vice Chancellor, Liverpool University; Mr. Mervyn Griffith-Jones, Recorder of Grantham; Sir Anthony Hawke, Common Serjeant; Mr. J. K. T. Jones, Home Office; Mr. F. H. Lawton, Q.C., Recorder of Cambridge; Mr. A. P. Marshall, Q.C., Recorder of Coventry; Sir Theobald Mathew, Director of Public Prosecutions; Mr. Frank Milton, Metropolitan Stipendiary Magistrate; Mr. A. C. Prothero, Solicitor; Mr. James Whiteside, Solicitor, Clerk to the Exeter Justices; Dr. Glanville Williams, Fellow of Jesus College, Cambridge; and Brigadier A. C. C. Willway, Chairman of Surrey Quarter Sessions.

Street Offences Bill

Considerable controversy surrounds clause 1 (1) of the Street Offences Bill introduced by the Home Secretary to implement the Wolfenden Committee's recommendations on prostitution. The clause reads:

> "It shall be an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution."

The controversy centres around the removal from this offence of the requirement to establish "annoyance." It is submitted by many people that the removal of this requirement, which was made for practical reasons, leaves insufficient protection from a charge on this count for an innocent and respectable woman. At the same time the retention of the words "common prostitute" are regarded as producing an automatic prejudice against the person charged. Mr. Butler's proposal that the police should give two cautions before charging but that these cautions should not be a statutory requirement does not seem to have calmed any fears.

At page 204, *post*, Dr. James considers the Bill in detail. We have little to add to his comments, except to accord with his feeling that the word "loitering" should not have been retained, having regard to the changed nature of the offence. The necessity to prove purpose may not be a sufficient check on what appears to us the most dangerous threat to innocent women.

Following Dr. James, Mr. Christopher Williams gives us a police viewpoint on the Bill. This is of particular value in connection with the cautioning system, as the police already have considerable experience of how this system works in practice.

The Bill, in fact, will bring English law and practice into line with Scottish law and, while we can foresee difficulties being encountered when a greater number of prostitutes plead "not guilty" to a charge of soliciting for the purposes of prostitution, the difficulties appear to be theoretical rather than practical.

Traffic wardens

In most urban areas a great deal of police time is taken up in dealing with minor traffic offences, particularly parking offences. At a time when serious crime is increasing and when the majority of police forces are undermanned it is sometimes felt that the police are not fulfilling their proper function in spending so much time on traffic duty.

Considerations of this nature have led the Chief Constable of Nottingham, Captain A. Popkess, C.B.E., to formulate and submit to the Home Secretary a scheme for the formation of a corps of civilian traffic wardens. Captain Popkess has been kind enough to outline the scheme for readers of this *Review* at page 186, *post.*

The *Police Review* has published some vigorous criticisms of the scheme.[2] In particular, it is suggested that a traffic warden on duty will not be as generally useful as police officers doing the same duties. This may well be true, but the fact remains that there are not sufficient policemen to perform all the duties which they are required to perform. This being so, it is submitted that a scheme such as this, which aims to relieve the heavy pressure on the police by delegating minor duties without placing police powers in the hands of civilians, should be given a practical trial.

Mr. David Renton, Joint Under Secretary of State for the Home Office, said in answer to a question in the House of Commons on February 16, that, if a satisfactory scheme could be worked out the Home Secretary would welcome an experiment of this kind. It would provide valuable evidence of the contribution which could be made by a separate force of civilian wardens in helping the police in their task of keeping the streets clear of stationary vehicles.

Nor is this Nottingham's only contribution to the solution of the problem faced by most Chief Constables as to how best to use their undermanned forces. Captain Popkess recently revealed to the press that Nottingham City Police have been experimenting with radio control of foot patrols, by means of a radio receiver which can be carried in a constable's tunic pocket. Signals sent out by a central transmitter and an "Encoder" can call any single one of 999 men.

Also, in Nottingham's drive against street prostitution, the use of police cars instead of foot patrols has been very successful in apprehending the "kerb-crawlers"—men soliciting from cars.

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[2] See 67 *Police Review* 41, 70, 82.

Consolidation of Highway Law

The Highways Bill, published last month, will, if it comes into force, bring about several amendments of police reference books. The 311 clauses and 26 Schedules of the Bill in its present form repeals completely, or almost completely, more than thirty former Acts, and amends more or less considerably nearly fifty others, including some old favourites such as the Highway Acts of 1835 and 1864, and various Public Health Acts. No attempt, as is pointed out in the Report of the Committee[3] which is published with the Bill, has been made to consolidate the law in this field for more than a century. The greater part of the Bill relates to administrative measures, but several minor but common offences of interest to the police are drawn together and re-enacted in sensible language.

The Bill does not, of course, do what many police officers might wish; it makes no attempt to reproduce in a neatly codified form all the offences that have to be dealt with on our roads. As the Committee say in their report, much needs to be done by fresh legislation to put the law on these matters in a really satisfactory state.

But at least the Bill does do one thing that will be welcomed; no longer is there to be an indictable offence of failing to maintain a highway repairable by the inhabitants at large, for the Bill abolishes the phrase, and with it the relevant part of section 1 of the Evidence Act, 1877. And so students of police law may soon turn to their list of admissible and compellable witnesses, and cross out the bit about the spouse of a person charged with failing to repair the highway. [C. W.]

Private prosecutions

An interesting instance of initiative on the part of private persons using the provisions of the criminal law in order to protect their interests was provided in the Uxbridge, Middlesex, Magistrates' Court on January 19. A car-hire firm enjoying by contract with the Ministry of Transport and Civil Aviation a concession at London Airport, under which their vehicles, which were not licensed as hackney carriages, were allowed to stand within the airport area and accept bookings by passengers in the lounges by means of push-button signals, was prosecuted by taxi drivers for plying for hire with unlicensed hackney carriages. The magistrates convicted; the car-hire firm are said to be considering an appeal.[4]

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[3] Report of the Committee on Consolidation of Highway Laws, H.M.S.O., Cmnd. 630.

In this age when so many people tend to sit back and expect the powers that be to do everything for them, such enterprise is refreshing. [C. W.]

Judicial appointments

Stephen Chapman, Esq., Q.C., has been appointed Recorder of the City of Rochester.

Oswell Searight MacLeay, Esq., has been appointed Recorder of the Borough of Maidstone.

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[4] *The Times*, January 21.

Eric Burgin

"If there's one thing I cannot stand, it's a poor loser!"

R. v. Aspinall and the Criminal Law of Gaming[1]

"Fortunately there is no evidence that the activities of the kind in which Mr. Aspinall is purported to indulge are widespread." This statement was made on May 6, 1958, by Lord Chesham, in the House of Lords, replying on behalf of the Government to a question about the cost to public funds of the unsuccessful prosecution brought against Aspinall and others,[2] and about changes in the law of gaming generally.

Aspinall had been prosecuted under section 4 of the Gaming Houses Act, 1854. The two charges against him were that "... being a person having the use of a certain room ... (he) did use the same for the purpose of unlawful gaming being carried on therein," and that he "... did assist in conducting the business of a certain room ... which was then being used for the purpose of unlawful gaming being carried on therein." Aspinall's mother, Lady Osborne, was prosecuted under the same section, the charge against her reading that "being the occupier of a certain room ... (she) did knowingly and wilfully permit the same to be used for the purpose of unlawful gaming being carried on therein." The charge against the third accused, Burke, was the same as the first of the two charges against Aspinall. The accused were committed for trial at the preliminary hearing, but at the County of London Sessions the Deputy Chairman (Mr. F. H. Cassels) ruled that there was no evidence to go to the jury and directed formal verdicts of Not Guilty to be returned. In the circumstances Lord Chesham's statement in the House of Lords could have been more happily worded. The noble Lord went on to say that "the facts of the case have been "brought to the attention" of the Home Secretary. As the case was decided on submissions of law before the defence had been called upon to offer any evidence, there was, of course, no finding of fact by the learned Deputy Chairman. Presumably Lord Chesham's reference to the "facts" meant the evidence of the prosecution witnesses at the trial, that is to say evidence which was held, even without contradiction, to be insufficient to prove the offences charged. The Minister also conveyed the mistaken impression in his speech that the decision of the case turned entirely upon the question of whether or not there was sufficient evidence of "habitual use" of the premises. This issue certainly played some part in the proceedings, but the principal matter debated was the more interesting question of what is meant by "unlawful gaming."

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[1] The authors are obliged to remain anonymous.

[2] See [1958] Crim.L.R. 546.

In one respect at least, the case of *Aspinall* was unique: it disclosed a major flaw in the reasoning of *Jenks* v. *Turpin*,[3] hitherto regarded as the *fons et origo* of the criminal law of gaming in England. The purpose of the present article is to analyse in this new light the effect of the existing cases and to attempt a restatement of what is apprehended now to constitute "unlawful gaming."

The facts

The relevant facts (for the purpose of the present discussion) which were proved in *Aspinall*, entirely through the mouths of the prosecution witnesses either in chief or in cross-examination, were these:

(1) The premises in question were occupied by the defendant Lady Osborne as a temporary London home for herself and certain of her children;

(2) On two occasions, December 19, 1957, and January 9, 1958, police officers had observed the game of *chemin de fer* being played there; and on another occasion, December 5, 1957, some fifty people had congregated there during the evening;

(3) *Chemin de fer* is a game of substantially pure chance, the element of skill being negligible; the banker has a slight advantage over the other players, but the bank moves at some speed from player to player so that, in the course of the evening, each player would be banker about the same number of times.

It should be noted—and indeed this was crucial to the decision—that there was no evidence from which it could be inferred that any of the defendants (or indeed anyone else) took any "cut" on the playing of the game, such as is usually called a "tax" or "*cagnotte*."

"Unlawful gaming"—a first definition

The essential ingredient of all the statutory offences under the Acts of 1845 and 1854 is "unlawful gaming." Let us begin with a simple definition:

> "Gaming may be unlawful by reason of the place in which it is carried on, or by reason of the unlawfulness of the game itself," said Hawkins J. in *Jenks* v. *Turpin*.[4]

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[3] (1884) 13 Q.B.D. 505.

[4] *Ibid.*, at p. 513.

The only place (other than a licensed house, which is not relevant here) in which it is unlawful to play an otherwise lawful game is a common gaming house.[5] Therefore, one can say that "unlawful gaming" means either playing an unlawful game or playing any game, other than a game of mere skill,[6] in a common gaming house.

We shall deal later with the concept of an "unlawful game." First we must consider that elusive entity, the "common gaming house."

The common law

The common gaming house has been for more than four centuries, and still remains, a concept of the common law.

"A common gaming house," said Hawkins J.,[7] "is at common law a house in which a large number of persons are invited habitually to congregate for gaming at any game." The learned editor of Street on *Gaming* suggests that this definition is insufficient in one respect, namely that it omits to say that at common law a gaming house must be one that is kept for the purpose of gaming. This seems to follow from the wording of section 8 of the Act of 1541:

> "Noe manner of person of what degree qualytie or condicion soever he or they be . . . by himself factor deputye servante or other person, shall *for his or their gayne lucre or lyvinge,* kepe have houlde occupie exercise or maynteyne any common house alley or place . . ."

In *Daniels* v. *Pinks*,[8] Avory J. held that the "gain, lucre or living" element was unnecessary to prove a common gaming house by the statutory methods which we discuss below. That was, however, expressly a decision upon the construction of the 1845 Act, and did not affect the method of proving a gaming house at common law. In our submission, the element of gain to the keeper is still at common law a necessary requirement for proof of a common gaming house.

The statutory methods of proof

The Gaming Act, 1845, introduced three new methods of proving the existence of a common gaming house, presumably to facilitate prosecution where for one reason or another the ordinary common law elements could not be proved. These new methods are set out in sections 2 and 8 of the Act. Neither of the sections is free from ambiguity. Section 2 provides:

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[5] The Unlawful Games Act, 1541.

[6] Games of mere skill, and in particular tennis, bowls and quoits, were excluded from the ambit of the criminal law by section 1 of the Gaming Act, 1845.

[7] *Jenks* v. *Turpin, supra,* at p. 516.

[8] [1931] 1 K.B. 374.

> " In default of other evidence proving any house or place to be a common gaming house, it shall be sufficient, in support of the allegation in any indictment or information that any house or place is a common gaming house, to prove that such house or place is kept or used for playing therein at any unlawful game, and that a bank is kept there by one or more of the players exclusively of the others, or that the chances of any game played therein are not alike favourable to all the players, including among the players the banker or other person by whom the game is managed, or against whom the other players stake, play or bet: and every such house or place shall be deemed a common gaming house such as is contrary to law and forbidden to be kept by the said Act of King Henry the Eighth [9] and by all other Acts containing any provision against unlawful games or gaming houses."

This section can be construed in two different ways. It may be said that what must be proved is either the playing of an *unlawful game* at which a bank is kept, or the playing of *any game* in which the chances are unequal. Alternatively, it may be argued that what must be proved is either the playing of an *unlawful game* at which a bank is kept or the playing of an *unlawful game* in which the chances are unequal. The former reading seems preferable, for the latter construction would rob the phrase " any game " of all significance. The first of the two constructions also has some judicial support: see the judgment of Smith J. in *Jenks* v. *Turpin* [10] and also that of Palles C.B. in *Donaghy* v. *Walsh*.[11]

Section 8 of the 1845 Act provides that:

> " Where any cards, dice, balls, counters, tables, or other instruments of gaming used in playing any unlawful game shall be found in any house, room or place suspected to be used as a common gaming house, and entered under a warrant or order issued under the provisions of this Act, or about the person of any of those who shall be found therein, it shall be evidence, until the contrary be made to appear, that such house, room, or place is used as a common gaming house . . . "

In the *Aspinall* case the question was canvassed whether the words " used in playing any unlawful game " applied to the cards, dice, balls, counters or tables, or only to the "other instruments of gaming." There seems little doubt that the phrase "used in playing any unlawful game" qualifies all the words which precede it. The opposite conclusion leads to the abnormal result that an innocent kitchen table, if found in a place suspected of being a common gaming house, would be evidence that the suspicion was well founded.

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[9] *i.e.* the Act of 1541.
[10] *loc cit*, at p. 530.
[11] [1914] 2 Ir.R. 261.

"Unlawful gaming"—the full definition

A common gaming house may thus be proved in any one of four different ways, namely, by proving all the common law elements, by proving the statutory requirement in the first limb of section 2, by proving the statutory requirements in the second limb of section 2, or by proving the statutory requirements in section 8. We are now in a position to give a more elaborate definition of the words "unlawful gaming." Unlawful gaming means any one of the five following things:

(1) playing any unlawful game;
(2) playing any game of chance in a house or place in which a large number of persons are invited habitually to congregate for playing at such game, and which is kept for the purpose of gain;
(3) playing any game of chance in a house or place which is kept or used for playing therein at any unlawful game, and in which house or place a bank is kept by one or more of the players exclusively of the others;
(4) playing any game of chance in a house or place which is kept or used for playing therein at any game of chance in which the chances are not alike favourable to all the players (including the banker, etc.); or
(5) playing any game of chance in any house, room or place in which are found any cards, dice, balls, counters, tables, or other instruments of gaming used in playing any unlawful game, and which is entered under a warrant or order issued under the provisions of the 1845 Act.

These five definitions may be conveniently grouped into two classes. Numbers (1), (3) and (5) are tautologous, for they refer to the words "unlawful game" in defining "unlawful gaming." Numbers (2) and (4), on the other hand, do not include the words "unlawful game," and are therefore complete in themselves. In *Aspinall* the prosecution failed to prove unlawful gaming under head (2), the common law definition, because there was no evidence that the premises in question were kept for the purpose of gain, and because there was no sufficient evidence that " persons were habitually invited to congregate " there.[12]

The prosecution further failed to prove unlawful gaming under head (4) because there was no evidence that the game which had been observed was one in which the chances were " not alike favourable to all the players, including the banker." [13]

" Unlawful games "

Having failed to prove unlawful gaming under (2) or (4) the prosecution were therefore compelled to attempt to prove that *chemin de fer* was an unlawful game, that is to say they had to proceed by one or more of the three courses (1), (3) or (5). There are six games, and only six, which one can say with confidence are unlawful games. They are ace of hearts, pharaoh, basset, hazard, passage and every other game played with dice except backgammon, and roulette. These games were made absolutely unlawful by the Gaming Acts of 1738, 1739 and 1744. The attempt to prove *chemin de fer* an unlawful game leads to the thickest and most impenetrable part of the law of gaming, which Lord Mancroft has recently described in the House of Lords as " the present ungodly jumble " and " a state of unparalleled confusion."

Excessive stakes

The learned author of Street on *Gaming* suggests that a game is unlawful if it is " contrary to the principles of the common law," that is to say if it is played for a stake which, in all the surrounding circumstances, is so excessive as to tend to injure public morals. The last reported conviction for gaming for excessive stakes was in 1823.[14] This case was discussed by the Queen's Bench Divisional Court in *Jenks* v. *Turpin*. Hawkins J.[15] thought that it was no longer law because the leading judgment (that of Abbott C.J.) was based on a section in a statute of 1710 [16] which had subsequently been repealed by the 1845 Act. But Smith J. took the opposite view and said [17]:

> " I wish also to add that what was said by Best J. in *R.* v. *Rogier* seems to me to be still good law, and therefore common sense, even though the statute of Anne has been

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[12] The defence contended successfully that " habitual " use corresponded with " keeping." Thy relied upon some of the old unlicensed houses cases to show that the evidence did not amount to habitual use, and in particular upon *Gregory* v. *Tuffs* (1833) 6 C. & P. 271, in which it had been held that the use of a room on twelve different nights over a period of twelve weeks was less than habitual use.

[13] See above " The facts," (3).

[14] *R.* v. *Rogier,* 2 D. & R. 431 ; 1 B. & C. 272.

[15] *Jenks* v. *Turpin* at p. 525.

[16] 9 Anne, c. 14.

[17] *Jenks* v. *Turpin* at p. 552.

> repealed. He there says: 'It is quite clear that any practice that has a tendency to injure public morals is a common-law offence. No game is unlawful in itself: but every game may be rendered so by playing at it for an excessive stake; for, it is the amount played for, and not the name or nature of the game which is the essence of it, and which constitutes an offence in the eyes of the law.' "

It is possible that this division of opinion among the court may have arisen from the two judges reading different reports of *R.* v. *Rogier*. The Barnewall and Cresswell report stresses the statutory aspect, while the Dowling and Ryland report emphasizes the common law aspect of the judgment. The section, however, of the 1710 Act on which Abbott C.J. relied (s. 2), referred not to any prohibition of gaming for excessive stakes, but only to the recovery of certain gaming debts. In the circumstances it seems to us that the view of Smith J. is to be preferred to that of Hawkins J., and that there is still a class of games unlawful at common law.

A circular definition

The judgments in *Jenks* v. *Turpin* created a further definition of " unlawful games." " I divide them " (unlawful games) " into two classes," said Hawkins J.,[18] " first those which are absolutely forbidden by name, and to the gaming at which a penalty is attached. . . . The second class comprises a number of games not altogether prohibited under penal consequences, nor declared to be altogether illegal, but which nevertheless have been styled ' unlawful ' by the legislature, because the keeping of houses for playing them and the playing them therein by anybody were rendered illegal." The proposition developed by the Divisional Court in *Jenks* v. *Turpin* may be shortly stated as follows: " Any game of chance played in a common gaming house is an unlawful game."

The difficulties of this argument were not immediately apparent in *Jenks* v. *Turpin*. In that case there was strong evidence of habitual user, strong evidence of " keeping for gain," and the game played was baccarat banque, in which the bank remains with one person and in which the chances are manifestly unequal. The prosecution therefore had no difficulty in proving that the house in question was a common gaming house by the common law method of proof (head 2), or by the method in the second limb of section 2 of the 1845 Act (head 4). Neither of those two methods of proof involved proving the playing of an " unlawful game."

But when, as in *Aspinall*, the prosecution are compelled to attempt a method of proof which involves proving an " unlawful game," the argument becomes circular. An " unlawful game," say the prosecution, is a game of chance played in a common gaming house; a common gaming house is a house in which an unlawful game is played. Having started this roundabout in *Jenks* v. *Turpin,* Hawkins J. tried unsuccessfully to find some way of getting off it. This he attempted by going back to the statute of Henry the Eighth, the Act of 1541. His argument [19] may be summarised as follows:

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[18] *Jenks* v. *Turpin* at p. 532.

(i) The expression " unlawful games " in the 1845 Act refers to those games which were declared unlawful by the 1541 Act, other than games of skill.
(ii) The 1541 Act declared to be unlawful (*inter alia*) " carding " and " any new unlawful game hereafter to be invented."
(iii) Games of cards invented since 1541 are *ejusdem generis* with " carding " in the 1541 Act.
(iv) Therefore any game of cards invented since 1541 is an unlawful game under the 1541 Act.
(v) Therefore any game of cards invented since 1541 which is not a game of mere skill is an unlawful game under the 1845 Act.

The flaw in Jenks v. Turpin

" There is a distinction," said Avory J. in *R.* v. *Hendrick,*[20] " between an ' unlawful game ' and ' unlawful gaming.' " Severe criticism of the judgment of Hawkins J. in *Jenks* v. *Turpin* has been made on the ground that it ignores this distinction. The Act of 1541 declared the playing of certain games under certain circumstances to be unlawful. One of the games mentioned was " carding." Whether one refers to these games as " unlawful games in certain circumstances " or as " games the playing at which in certain circumstances in unlawful gaming " is merely a matter of terminology. The substantial distinction is between the games mentioned in the statutes of George II, such as ace of hearts, which were made unlawful wherever and however they were played, and the games mentioned in the statute of Henry VIII, which were made unlawful only when played in any " common house, alley or place " maintained for " gayne lucre or lyvinge " (and originally only when played by servants at times other than Christmas). The nature of the latter group of " unlawful games " is put shortly by Popham C.J. in the *Case of Monopolies*[21]:

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[19] *Ibid.*, pp. 523 and 524.

[20] (1921) 37 T.L.R. 447.

[21] (1603) Noy 178.

> "The statute of 12 R. 11 H. 4 and 5 [22] do shew plainly that none were restrained from playing at dice, but servants, and they not altogether restrained, but at times, and from card-playing none restrained until 33 H. 8" (the 1541 Act) "and in that statute, certain persons and certain places restrained, which declareth the intents of the Parliaments to be, that it should be lawful for the rest not restrained, and for them restrained in the times prescribed for them to play in."

Under the present law the position is that the 1541 Act has made certain games unlawful when played in a common gaming house; the 1845 Act provides three new methods of proving a common gaming house, two of which depend on proving an unlawful game; and according to *Jenks* v. *Turpin* one may prove an unlawful game for the purposes of the 1845 Act by showing that the game in question is one of chance played in a common gaming house. In every reported unlawful gaming case since 1884, the courts have been able to climb off this merry-go-round on to the firm ground of "unequal chance," "habitual user" or "gain, lucre or living." The significance of *Aspinall* was that the prosecution never succeeded in getting off the *Jenks* v. *Turpin* roundabout. They placed some reliance on the case of *Fairtlough* v. *Whitmore* [23] which concerned the game of *chemin de fer*. But this Chancery decision merely followed *Jenks* v. *Turpin* in holding that *chemin de fer* was a game which if played in a common gaming house would be an unlawful game in the context of the 1845 Act.

A suggested restatement

The present state of the law of gaming may therefore, in our submission, be shortly summarised as follows: unlawful gaming means playing an unlawful game or playing a lawful game in a common gaming house. A common gaming house may be proved in four ways, two of which involve proving an unlawful game. There are two or possibly three classes of unlawful games. The first class consists of six games which are no longer played in this country. The second consists of lawful games of chance which are unlawful only if played in a common gaming house. There may also be a third class of games which are unlawful because they tend to injure public morals. No one has been convicted for playing such a game since 1823. According to one of the two judges in *Jenks* v. *Turpin* the class still exists, according to the other it has ceased to exist.

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[22] The statutes referred to here are 12 Ric. 2, c. 6, 11 Hen. 4, c. 4. There appears to be no relevant statute passed in the reign of Henry V.

[23] (1895) 11 T.L.R. 288; 64 L.J.Ch. 386.

Mr. Sutterthwick's Court

By A. E. Jones, *Magistrates' Clerk*

Too Much to Drink

Drunk in the street

"You are charged with being drunk in the street. Do you plead guilty or not guilty?" said Frell for, perhaps, the thirty-thousandth time in his career.

"Can I ask a question first, sir?" replied James Doyle.

"What is it?"

"I want to know the legal definition of 'drunk.'"

"There isn't one," said Mr. Sutterthwick. "It's a matter of opinion."

"Well, in my opinion, I wasn't drunk—not what you would call really drunk."

"Then plead not guilty, and I'll hear the evidence," said the magistrate.

"Take the oath, please," said Frell to the constable who had accompanied the defendant into the court room and was now in the witness-box.

Evidence

The solemn words were duly gabbled through—and name and number added. Then, refreshing himself at intervals from his note-book, the officer continued: "At 10.35 p.m. last night, your worship, I saw the defendant walking along Manor Road with a very unsteady gait. Eventually he staggered into the wall of a building and fell down. I went up to him and asked 'Are you ill, sir?' He replied 'No, I'm drunk.' I told him I should arrest him and I cautioned him. He made no reply. I conveyed him to the Police Station where he was formally charged and cautioned, and again made no reply. . . . That is the case, your worship."

"You haven't given us your opinion of his condition, officer," the clerk pointed out.

"He was drunk, sir."

"What made you think that?"

"He was very unsteady on his feet and his speech was slurred."

"Anything else?"

After a short pause for consideration, the constable added, rather half-heartedly, " His eyes were glazed and his face was flushed."

" Anything else? "

The witness—a careful, methodical Scotsman—was now obviously nearing desperation in his mental search for what was missing. Mr. Sutterthwick broke the silence rather testily with " Well, did the night air remain unpolluted in his vicinity? "

" I beg your pardon, sir," said the officer, startled and bewildered for the moment. However, enlightenment appeared suddenly in his face before the magistrate could say any more. " The defendant smelt very strongly of alcoholic liquor, your worship," he concluded triumphantly.

" Was he very drunk? " asked Mr. Sutterthwick.

The witness pondered the question and replied with Scottish caution " Reasonably drunk, your worship."

" I think I understand what you mean," said the magistrate.

" Do you want to ask the witness any question?" inquired Frell of the defendant.

" He hasn't got any witness, sir. That's my point. It's just oath against oath " was the answer.

" The police constable is a witness. He's just given his evidence and you are entitled to question him," explained the clerk.

" Well, he says he arrested me in Manor Road, and I was never in Manor Road. I was walking down South Street, and I hadn't even got to the Fountain."

" What do you say to that? " said Frell to the officer.

" He was in Manor Road when I first saw him, and I arrested him there. I never saw him in South Street," replied the constable stolidly.

" Any other question to the officer? " asked the clerk.

" No. What's the use. He's prejudiced."

" Do you wish to give evidence on oath yourself? "

" No, I don't think it's necessary. I can say it from here," replied the defendant, displaying, rather indiscreetly, some familiarity with court procedure.

" What do you wish to say to me? " said Mr. Sutterthwick.

" Well, your honour, it's as I said. I was just walking down South Street. I'd been at work till seven. Then I went home and had a meal. Then I just thought I'd like a bit of a walk. And the policeman took me in the nick. That's all."

" I'm not allowed to ask you any questions, as you've decided not to give evidence on oath," said the magistrate, " But do you wish to say anything about what the constable said concerning drink? "

"Oh yes, I admit I'd had a drink, your honour. But that isn't a crime."

"Would you care to say what you'd had to drink? "

"Oh, I'd had a good drink, your honour. But I'm used to it. As a matter of fact I've had just as much this morning as well—just to show you that it doesn't make any difference to me."

"Is there anything else you wish to say to me? "

"Only that I wasn't violent and I remember everything that happened, so I couldn't have been drunk, your honour. And I was never in Manor Road. I didn't even get to the Fountain."

"Have you any witness to call? "

"No, your honour; and nor has he. It's just his word against mine."

"I've no hesitation in finding you guilty," said Mr. Sutterthwick. "I think the officer's recollection is more reliable than yours, and I accept his evidence. When you said to him 'I'm drunk' it was, in my opinion, a clear case of *in vino veritas*."

"No, your honour, it was that Lisbon wine," corrected the defendant.

Antecedents

"What is known about him? " inquired the magistrate.

"There are two previous convictions for drunkenness in the last month," reported P.C. Mure, the assistant gaoler, and gave the dates and the penalties.

"Do you admit those convictions? " said Frell to Doyle.

"Yes. I pleaded guilty to them, sir. I always do when I am guilty."

"Do you know anything about him? " Mr. Sutterthwick asked the constable.

With Scottish thoroughness the officer began his account with the defendant's birth.

"Born in error? " repeated Mr. Sutterthwick with some asperity, feeling that this sort of description—though not necessarily inaccurate—was impermissible from a police witness.

"Born in Southern Ireland, sir," explained Frell who, from holidays spent in Scotland, had become accustomed to its phonetics.

"Oh, Eire; I see," said the magistrate, and went on rapidly "But I don't want to go so far back as that. What is he doing now? What's his occupation? "

"He's a builder's labourer, your worship," replied the officer.

"What do you earn?" Mr. Sutterthwick asked the defendant.

"4s. 3½d., your honour."

"That's the hourly rate, I suppose. How much do you make in a week?"

"That all depends, your honour. It varies."

"What does it average?"

"In bad weather we only get the basic."

"What did you earn last week?"

"Oh, about £11, I think."

"Have you got any dependants?"

"Yes, your honour. A wife and three children."

"How much do you give your wife a week?"

"I don't give her anything, your honour. She's living with another man."

"Are you paying anything for the children, then?"

"No, your honour. They're not mine."

By this time, Sergeant Quing, the warrant officer, was having difficulty in keeping the merriment of the public benches within decent bounds.

Sentence

"James Doyle," said the magistrate, "You're coming here too often. You've got to pull yourself together. I doubt whether you're really in a fit state to do yourself justice, even this morning. You're liable to a fine of forty shillings now, as this is the third conviction for drunkenness in a year. I'll make it twenty shillings this time; but, if you come back on a similar charge, you may have to find a surety for your good behaviour or go to prison in default. Just use a bit of self-control in future and stop drinking before you've had too much. I know it's no good asking you to keep off it altogether."

"Thank you, sir, and good health to your honour," said Doyle as he turned to go with Mure. But a snigger from the back of the court made him pause on the steps of the dock and say, halfway between dignity and belligerence, "What are you laughing at? There's nothing funny about it?" Which, in one sense, was quite true. But this was not an acceptable occasion for rebuking public levity of mind. "Come along, please," said Mure, tugging at Doyle's sleeve; and, much to the regret of the court's back benchers, the defendant consented to be led away.

Frell looked at the court clock and noted that a quarter of an hour had been spent on what looked like one of the least of a busy morning's cases.

Drunk in charge of a motor-vehicle

As the daily list progressed, the charges became more heinous; James Doyle was succeeded in the dock by Walter Dummick, who stood accused of a much graver alcoholic breach of the criminal law. The clerk said to him " You realise that this charge against you is a serious one? Do you wish to apply for a remand so that you can see a solicitor? "

" No sir. I want the case settled now, please," said Dummick urgently.

" You're quite sure you don't want to get legal advice? " said the magistrate.

" Yes, sir. I think I can conduct my own defence. I don't want a remand."

" Very well; I can't compel you to be legally represented," said Mr. Sutterthwick.

" You are charged with being in charge of a motor-vehicle on a road while under the influence of drink to such an extent as to be incapable of having proper control of it," said Frell, and continued, " On that charge, because you are liable to more than three months' imprisonment without the option of a fine, you have the right to claim to be tried by a jury at another court, the quarter sessions. If you don't want to be tried by a jury, the magistrate will try the case here."

" I want to be tried here and now, please. I don't want to lose any more time from my work," broke in the defendant anxiously.

" And do you plead guilty or not guilty? "

" Not guilty. I wasn't in charge of it. I wasn't in a fit state to be."

" Is this another one ' born in error '? " murmured Mr. Sutterthwick to Frell; aloud, he said " The first witness, please."

Inspector Campting rose from his seat and asked " Will your worship please hear the doctor first, so that he can be released as soon as possible? "

" Certainly," said Mr. Sutterthwick; and Dr. Glotters made his way briskly to the witness-box, seized the Testament and recited the words of the oath without having to look at the card on which they were written.

Medical evidence

Dr. Glotters had been giving evidence in this kind of case for a quarter of a century; he knew exactly what to say and had long ago learnt the dangers of saying too much. " William Eustace Glotters, 139 Mill Lane, registered medical practitioner " he began without prompting from the clerk, and continued, keeping a considerate eye on the progress of Frell's pen, " I was called to examine this defendant at the Police Station last night, sir. I was told what was alleged against him and I examined him and carried out a number of tests. Altogether, I was with him for twenty minutes, from 11.50 p.m. until 12.10 a.m. As a result of my examination I came to the conclusion that he was so far under the influence of alcohol as to be unfit to have control of a motor-car. I told the defendant so and he said, ' You're the doctor, doctor ' . . ." Dr. Glotters paused and then, addressing the magistrate, said, " Do you wish me to give details of my examination, sir? "

" As the defendant isn't represented, I can't very well leave the matter for cross-examination in this case," said Mr. Sutterthwick. " I suppose I ought to hear, at least, about the main tests you applied—though, in these charges involving drink, I always feel that the general impression made on an experienced observer is a far more valuable piece of evidence than a list of symptoms, any one of which might be due to a number of causes."

Dr. Glotters referred to his notes and said " I found the defendant asleep on a bench in the charge room. He smelt strongly of stale drink. When he got up he held on to a table for support. He walked with an unsteady gait and staggered badly when turning. He swayed when standing still. I asked him whether he had recently had any illness or was under any disability. He said he was quite fit and I found no evidence of any disease. His pulse rate was 120 and the pulse was full and bounding. His tongue was furred. The pupils of his eyes were dilated and showed practically no reaction to bright light. He did the finger and nose test very badly; he was quite unable to find his nose with his eyes shut. He had lost all sense of time. I asked him when he had had his last meal, and he said ' About 7 o'clock.' I further asked him how long ago he thought that was, and he said ' About an hour.' It was then just past midnight. At my request he wrote his name and address and tried to do some simple sums I gave him. The results are on this sheet of paper." Sergeant Quing took it from the doctor and handed it to the magistrate, who remarked " The difficulty I'm in is that I don't know how good or bad his arithmetic and writing normally are."

" I think, sir, that what's on that paper is too bad for any man of his education in a normal state," said Dr. Glotters.

" My impression is that I've seen similar handwriting on medical prescriptions and certificates," said the magistrate, glancing at the document. " I don't mean on yours, of course, Dr. Glotters," he added quickly.

The witness smiled but, diplomatically, did not reply to this.

"Do you want to ask the doctor any questions?" said Mr. Sutterthwick to Dummick.

"Yes, sir, I would like to ask him one. . . . Doctor, is it possible I was drugged?"

"I saw no indication that you'd taken any drug, and you didn't mention any such possibility to me at the time."

"But supposing I didn't know then I was drugged, and you didn't think of it, is it still possible that I was?"

"I can't really reply to that without knowing what drug is suggested."

"I don't know what drug it was. All I know is that I must have been drugged . . . or this would never have happened. . . . You can't deny that it's possible I was drugged, can you, doctor?"

"All I can say is that your condition could be fully accounted for by alcoholic poisoning, and I saw nothing to suggest that you were affected by any other drug."

The defendant obviously considered this reply unsatisfactory, but, just as obviously, found it baffled further questioning. He contented himself with saying "You say I was poisoned and you can't say I wasn't drugged."

"Alcohol in excess is a poison," explained the doctor.

"Have you any doubt at all that he was under the influence of drink?" asked the magistrate.

"None whatever, sir."

"Was it in any sense a borderline case?"

"No, sir. I should have had no hesitation in certifying him to be drunk."

"Thank you, doctor; you need not wait. I expect you are wanted elsewhere."

"Thank you, sir. I have a surgery full waiting for me," said Dr. Glotters, and hastened away to the more regular part of his professional work.

Police evidence

The next witness was a constable who related how he had found the defendant on his hands and knees beside a car which was parked some two feet from the kerb. "There was fresh vomit in the gutter nearby," the officer went on. "I asked the defendant if it was his car and he said 'Yes.' I asked him what he was doing and he replied 'Looking for the ignition key, you clot.' I noticed that his speech was slurred, his eyes were staring and his breath smelt heavily of drink. I asked him to get up, and, when he did so, he held on to the car for support. He was very unsteady on his feet. I saw that the ignition key was in the switch in the car and I pointed this out to the defendant. He said 'You must have put it there.' I came to the conclusion he was under the influence of drink to such an extent as to be incapable of having proper control of a motor-vehicle. I told the defendant my conclusion, and arrested and cautioned him. He replied 'If you say so.' He was taken to the Police Station, where the inspector in charge told him he proposed to call a doctor to examine him, and asked him if he wished a doctor called on his own behalf. The defendant replied, 'No. Your doctor will do.' Dr. Glotters arrived at 11.50 p.m. and examined the defendant, who was afterwards formally charged and cautioned, and replied 'Can I go now?' "

"Is there any possibility of the statutory defence applying here?" whispered Mr. Sutterthwick to Frell.

"I don't think so, sir," replied the clerk. "He has to prove, firstly, that there was no likelihood of his driving the car so long as he remained unfit to drive, and, secondly, that he hadn't already driven the car in that state. But the evidence is that he said he was looking for the ignition key—presumably to drive; and the position of the car suggests that it had just been driven there by somebody who was incompetent to park it properly."

"Well, we'll have to see what he says about that," said the magistrate.

But first there was cross-examination of the constable.

"Did I appear to you to be drugged, officer?" asked Dummick.

"Only if you call alcohol a drug" was the reply.

"No, I don't mean that. . . . Did I look and behave like a person under the influence of alcohol usually does?"

"Well, they don't all look and behave the same," was the experienced reply.

"But did I seem normally under the influence?" persisted the defendant.

"I don't know what you mean by 'normally under the influence,'" said the constable, and Dummick gave it up.

"Is that the case for the prosecution?" asked the magistrate.

"There is evidence from another constable, and from the Station inspector, as to the defendant's condition," said Inspector Campting.

"The facts don't seem to be challenged."

"Very well, your worship. We'll close our case."

Defendant's evidence

The defendant eagerly availed himself of his right to give evidence on oath; and, after having given his full name, address and occupation, was allowed by the clerk to choose the starting point of his narrative. " I came to town just for an evening out," explained Dummick, " And I met one or two chaps I know just by sight; and they took me to a club—I think it was called the 'Nirvana'—and we had a drink there—only one. Immediately after it I began to feel funny. I didn't think anything at the time, but I'm sure now that they must have put something in it—I suppose as a joke; or else the stuff this club sells is doped. I've been told since it's not a very nice place. But I'd never been there before. Then these other chaps seemed to disappear—I suppose they didn't want to get into trouble—and I wasn't feeling at all well, so I decided I'd get a breath of fresh air. I remember getting in the car and sitting in it. Then I felt sick and got out, and, as I did so, I thought I'd knocked the ignition key out of the switch into the road. So, after I'd been sick, I was looking for it. But I don't think I drove the car at all; I wasn't in a fit state to."

" How did you get to this club? " asked Mr. Sutterthwick.

" Oh, I did drive there in the car—with these chaps. I meant I didn't drive it afterwards."

" Had you had anything to drink before you went to the club?"

" Yes, we had had a drink in a pub earlier on—just one round."

" What did you have to drink? "

" Only bitter."

" How much? "

" Oh, not more than a couple of pints."

" And what did you drink at the club? "

" Well, I don't know quite what it was supposed to be. One of the others paid and he called it the 'Club Special,' and I couldn't really make out the taste. But it couldn't have been just alcohol or it would never have had that effect on me. I've been driving twenty years and I've never been had up in court before."

The defendant returned to the dock and the constable was called back into the witness-box. " You're still on oath, officer," said the magistrate. " Do you know this Nirvana Club? "

" Yes, your worship."

" How far is it from where you found the defendant? "

" About a quarter of a mile, sir."

" I see. . . . And what sort of a club is it? "

" It isn't a very high-class place, your worship," was the cautious reply.

" Have you any witness to call? " asked Mr. Sutterthwick, turning to the defendant.

"Well, sir, I can't call any of these other chaps because I don't know their names or where they live; but I think the club proprietor could tell you what I had to drink."

"Is he here?" queried the magistrate.

"Yes, your worship" said Inspector Campting. "The defendant mentioned this to me before the court sat, and I arranged for him to attend."

"As so often happens, the police go out of their way to help the defence," commented Mr. Sutterthwick.

The club proprietor turned out to be a swarthy Levantine with a scar over his left eye and a convenient inability to understand English at awkward moments. He readily gave his name, address and occupation, but the rest of his evidence did not come so readily. He only vaguely remembered the defendant arriving at the club; the defendant was not a member, but one of the gentlemen with him was. He couldn't remember the name of that gentleman. He didn't really notice what they had to drink. He didn't pay much attention to them at all. They seemed all right to him. He couldn't say he saw them leave. He didn't know whether they all left together. He noticed nothing unusual about the defendant. The witness supplied only the ordinary drinks at his club, and he had never heard of the "Club Special." He didn't keep drugs, and, so far as he knew, nobody had ever put any drug in a drink at the club.

"Stand down," said Mr. Sutterthwick when it was clear that nothing more useful could be extracted. The club proprietor, his brow glistening with perspiration, left the witness-box with evident relief.

The defendant could think of nothing else to say except that it looked as if something funny had been going on somewhere.

Verdict and sentence

Mr. Sutterthwick cleared his throat and said, "You're clearly guilty on this charge. It would be the same offence if you were under the influence of a drug in the circumstances. It is true that, if you had had some drug administered to you without your knowledge and you were quite unaware of its effect on you, you might have a good defence to this charge. At any rate, it would be very strong mitigation. However, I'm not satisfied that you'd had anything but alcoholic drink—though it may have been very bad alcoholic drink, or very unwisely mixed. It's perfectly obvious that, in fact, you drove the car in an unfit state, even if it was a comparatively short distance. I'm not sure that it isn't my duty to the public to send you to prison. However, you're not actually charged with driving under the influence of drink, so I'll make it a monetary penalty this time. But this must never happen again. Pay a fine of £25 and . . . what are the police costs? "

" Five guineas, your worship—for the doctor," said Inspector Campting.

" And five guineas costs," continued Mr. Sutterthwick. " You will also be disqualified from driving for twelve months, and your licence will be indorsed."

" Oh, must you disqualify me, sir? " pleaded the defendant in dismay. " I've never been convicted before and, as a commercial traveller, I can't make a living without a car."

" I know that, as you're only charged with being in charge of the car, and not with driving it, disqualification isn't compulsory. But it's within my discretion; and I think you should be disqualified. People who ' come to town for an evening out ' which involves drinking should leave their cars at home. You haven't shown the sense of responsibility that's required of drivers if we're to reduce the death rate on the roads in this country. . . . You're entitled to apply for your licence back in six months' time. But I'm not making any promises."

" Can I appeal? " asked Dummick desperately.

" Yes. They'll tell you about it, and help you with forms, in the office."

" And can I drive pending the appeal? "

" I'll consider that when you've served the necessary notices."

" This way please," said the assistant gaoler.

" I suppose I shall have to get a solicitor, after all," grumbled the defendant as he was escorted from the court room.

Penal Practice in A Changing Society[1]

Two Views

Introduction

The Home Secretary presented to Parliament, on February 2, a White Paper on penal problems in this country. It contains a short review of the present position and proposes reforms; but no immediate legislation is contemplated. The background to this Paper is the high rate of crime that has been maintained in this country since the war, despite material prosperity, education and social welfare. Particular emphasis is placed upon the young male offender between sixteen and twenty-one years of age. Many important aspects of the problems relating to the criminal and to penal administration are considered; but, to a lawyer and penologist, two naturally present themselves.

First, there is to be set up a Standing Committee on Criminal Law Revision, " in order that those deserving punishment shall not escape owing to defects in the criminal law." This is a very limited objective; but it could cover proposed legislation on new crimes which the Home Secretary referred to the Committee for consideration.

Young offenders

Secondly, two proposals are made in respect of the treatment of young male offenders, and in particular those between fifteen and twenty-one years of age. The law in this country expressly provides that persons under twenty-one shall not be sent to prison, unless there is no other appropriate method of dealing with them. If they have to be sentenced to imprisonment, they are kept separate from adult criminals. There are various alternatives, however, and the two made prominent by this Paper are considered here: detention centres and borstals.

A borstal sentence places emphasis upon the personal influence of the selected staff and on treatment as opposed to punishment. Individualisation is the cardinal principle and is implicit in the careful observation of the offender and his allocation to an appropriate borstal. At the borstal reception centres, an earnest endeavour is made to select the borstal institution likely to suit the offender's particular personality and difficulties. The prison sentence is generally preferred by the offender to a borstal one, since it is usually shorter and for a certain period. The borstal order is for three years; but release with after-care is permitted after nine months.

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[1] February 2, 1959, H.M.S.O., Cmnd. 645 (2s. 6d.).

The detention centre is much in favour at present. It was first introduced in practice in 1952 and novelty may be an attraction; but, for certain offenders between sixteen and twenty-one, this short and strict institutional treatment has undoubtedly been effective. The sentence may be up to six months but it is normally for three. The detention centre seems, however, only to be really helpful to those who have not had previous experience of institutional treatment. It is certainly not for all types, for instance, it would enable a juvenile to break with bad habits and undesirable company; but it would be of little benefit to a homosexual offender.

To avoid any but the worst young offenders being sent to prison the Paper makes two proposals. First, more detention centres are to be opened as soon as possible—at present there are four, two junior and two senior ones. These centres could then take all young offenders with a sentence of less than six months' imprisonment. The second proposal is more far-reaching and calls for an administrative and legal reorganisation. It involves all but the worst young offenders, with sentences of imprisonment over six months and under three years. This is a constructive answer to the serious problem of short-term sentences of imprisonment—at least for juveniles. The plan is to introduce a sentence of custodial training with a maximum of two years. The offender may, however, be released on licence and given the assistance of after-care after six months. This is analogous to the handling of the borstal boy today. This custodial training is to be carried out in specially allocated prisons and in borstals. The offender could be moved from one to the other and would not be subject to the fixed sentence of imprisonment; but he would undergo custodial training for an indeterminate period up to two years. This system would be far more flexible than the present one and would allow for any improvement—or deterioration—in the offender to be dealt with appropriately.

Many of the grave problems in relation to prisons and the adult criminal are discussed, including the need for more employment in prison and the payment of "the economic rate for the job." The latter principle is at present under consideration by the United Nations and the report of this inquiry will clearly be influential. In this connection, it is most satisfactory to see that the whole question of after-care, based upon the recommendations of the Advisory Council on the Treatment of Offenders (*The After-care and Supervision of Discharged Prisoners*), is to be sympathetically studied.

These proposals—and indeed many of the others put forward—are a great encouragement. They make public opinion more aware of the problems of penal treatment and may, if the suggestions are implemented, assist in keeping the present system up to date with modern thought. In the final analysis, however, the basic problem is, of course, not the institutions used or to be built, but the persons who run them. Their understanding of the offender and of his needs are absolutely essential. [T. E. JAMES.]

Police notes

Criminal Law Reform

Many police officers will have read with satisfaction the Government's appointment of a standing committee on criminal law revision, under the chairmanship of Lord Justice Sellers. The committee are to examine such aspects of the criminal law as the Home Secretary may refer to them. It will have been no surprise that among the first matters on which the committee are to begin work is the law of larceny and kindred forms of fraud. Few areas of the criminal law can have produced such exasperation and bewilderment, both in the charge room and the examination room, as that which conceals the refinements of larceny, false pretences and fraud. If the committee manage to bring light and common sense into this dark and stuffy corner, they will earn the gratitude of many people.

Another small pocket of resistance, so to speak, which the committee are to try to clear out is that in which lurk decisions such as *Fairclough* v. *Whipp*[2] and *D. P. P.* v. *Rogers*.[3] If a man persuades a child to handle him indecently one can see why it is not an indecent assault; but that it should not be an offence at all is contrary to common sense. It is to be hoped that the committee will fill in this gap promptly.

Compensation

Apart from the important proposals relating to penal reform and the treatment of offenders, the White Paper announces that a working party is to be set up to examine the late Miss Margery Fry's proposal for a scheme of compensation for the victims of criminal violence. There are, of course, already certain provisions for compensation in criminal proceedings; these were examined in detail in articles in earlier issues of the *Review*.[4] And the law of tort also provides for damages in such cases. But the weakness of these existing arrangements is that they all depend upon the ability of the author of the criminal violence to find the money. To base compensation, as the new proposals do, upon national funds raised by taxation is a new and rather startling idea. Startling, not because there is any difficulty about agreeing that the State, having failed to protect the well-being of a subject from criminal violence, should make it up to the victim out of State resources, but rather because of the difficulty that can be envisaged in assessing the amount of compensation in relation to the injury (here one is reminded of the Saxon tariff of "fines"), and because of the difficulty, once the principle is established, of confining its application to one form of injury, the physical, and not extending it to other injuries such as the loss of money or goods.

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[2] [1951] 2 All E.R. 834; 115 J.P. 612.

[3] [1953] 2 All E.R. 644; 117 J.P. 424.

But if the working party are able to steer a course through these difficulties, they will have many admirers.

—or Prevention?

They would have even more if they were able to persuade the Government that it would be cheaper, and less painful to the victims to use the money instead in making police salaries attractive enough to fill the current vacancies, and so prevent crime rather than poultice it.

[CHRISTOPHER WILLIAMS]

Suggested Organisation of Traffic Wardens

By CAPTAIN A. POPKESS, C.B.E.,
Chief Constable, Nottingham City Police

There can be little doubt that the great increase in traffic congestion in cities in recent years has had its impact on the present rise in crime. In some police areas, traffic difficulties press so heavily between 8 a.m. and 6.30 p.m. that it is necessary to employ anything up to 40 per cent. of the available foot patrol strength on such traffic duties as (a) dealing with kerbside parking and (b) the enforcement of the many traffic regulations.

In Nottingham, for example, there are prohibitions of various kinds that have to be enforced in 14 miles of streets; and the number of streets affected by such traffic regulations has increased from 41 in 1950, to 107 in 1958. Added to which, there are the many hours of patrol time spent by other constables, who in the course of normal police patrol duty have to enforce the many traffic restrictions on their beats, in addition to their other duties. The result of this is that police beats generally are in many instances not being patrolled as well now as once they were, and indictable crimes in Nottingham have increased from 2,950 in 1955 to 5,057 in 1958—and they are still mounting.

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[4] [1957] Crim.L.R. 305 and 377; [1957] Crim.L.R. 726.

The increase in the number of vehicles licensed in Nottingham is equally great. In 1948 it was 19,372; in 1958 it will have risen to something approaching 50,000.

It is to deal with this situation that such an organisation as Traffic Wardens is designed, who, it is suggested, should be under the control and supervision of the Police Traffic Department. Recruitment to be from suitable applicants up to the age of 45 years. They will wear a uniform with the shoulder flash "Traffic Warden," to identify them to the public; and they will be subject to a suitable code of discipline. Their powers will exclude powers of arrest. They will for the present be employed on certain traffic duties only, and be limited to offences under section 22 of the Road Traffic Act, *i.e.*, offences relating to parking places; and such obstructions of the highway as "No Waiting", "Unilateral Parking", "Parking restricted to 30 minutes", and "Vehicles left in dangerous positions."

Traffic Wardens would not ask for licences from drivers, but would require his or her name only. In the event of this being refused the usual report for information would be submitted to the Police Traffic Department by the Traffic Warden, indicating the registered number of the vehicle so that the name of its owner could be later ascertained by a constable, who would then complete a certificate under section 41 (2) (*a*) of the Criminal Justice Act, 1948. The information for summons would be laid by the Summons and Warrants Officer, the Traffic Warden being a witness in any court proceedings. As these are minor offences, procedure would be under the Magistrates' Courts Act, 1957.

It could be argued that it would be better to recruit more constables for these duties and not Traffic Wardens. But how many police forces are even able to recruit up to their pre-war establishments? Few indeed. On the other hand, the indications are that this recruiting problem will not apply to Traffic Wardens. Meanwhile, the problems of traffic congestion and crime have assumed such proportions that the matter can no longer wait.

A Scottish Newsletter

Parliament House, Edinburgh

The Manuel trial

The highlight of the legal year in Scotland in criminal affairs has been the case of Peter Manuel. The case of this murderer who was convicted of seven murders is extensively discussed at [1958] Crim. L.R. 654, and it is sufficient to recall that in many ways, from the legal point of view, the trial was unique. Manuel, whose extroverted personality dominated the trial, remained a showman almost to the end. He took special pride in his own personal appearance in the dock, he denounced police witnesses in a wild fury, he dismissed his counsel halfway through the trial, and he summed up the case on his own behalf in such a skilful manner as to draw compliments from the presiding judge. (The cynical may observe that, in view of his numerous previous experiences in court, as an accused person, it is not surprising that he should have learned to handle legal procedure with a certain facility.) But after his conviction, when his appeal was heard, Manuel refused to appear, contrary to the usual practice. After his execution, plaster casts of his profile were sold all over Glasgow.

Fairness to the accused

There are some grounds for saying that the law of Scotland leans over backwards to be fair to an accused person. Professor Gibb, who recently retired from the Chair of Law at Glasgow University, drew attention to what many consider to be an excessive tenderness towards the accused by his remark: " A criminal trial is not a game."

There have been several cases recently in the Scottish courts where the problem has arisen of reconciling the legitimate private interests of the accused with the more general interest of the public in the pursuit and detection of crime. Where statements of confessions of guilt are made which the accused subsequently denies, or where the circumstances of such alleged confessions render the evidence of them incompetent, then particular difficulties may occur. The position was summarised recently by the Lord Justice General (Lord Clyde) in *Manuel* v. *H.M. Advocate*,[1] where he said: " The law of Scotland goes much further than many other legal systems in protecting a person who is detained by the police from any risk of being driven or cajoled or trapped into admissions of guilt, even though this might complicate the quite legitimate detection of crime by the authorities, so anxious is our law to secure that such persons get fair play under our system of criminal administration, and so firmly rooted in our law is the principle that no man is bound to incriminate himself."

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[1] 1958 S.L.T. (Notes) 44.

In *Manuel's* case, the accused wrote out a confession in respect of several murders. Shortly before this was done, Manuel's father had been charged with the theft or reset of certain articles, found in the Manuel home, which had been associated with the murders. It was suggested at the appeal that the confession was inadmissible in evidence because Manuel had been induced to make it in return for a promise that his father would be released. The Appeal Court held that it would not be unjust to the accused to allow the evidence as competent.

A similar question which has come before the courts recently is whether it is fair to the accused to take evidence voluntarily from him on a particular charge, and then subsequently to charge the accused with a more serious crime based on that same evidence. Such evidence was allowed in the case of *McKie* v. *H.M. Advocate*,[2] but disallowed in *H.M. Advocate* v. *Graham*.[3] What is the explanation of this apparent contradiction?

To start with, in the first case, the offence was a statutory one, and in the second case it was a crime at common law. The evidence which was the subject of the dispute in *McKie* consisted of the results of a medical examination, carried out after the accused had been charged with a breach of section 15 of the Road Traffic Act. The accused was later charged with culpable homicide (*i.e.*, manslaughter) after it had been discovered that a person had been killed and his body thrown clear of the roadway. In *Graham's* case the evidence consisted of a statement which the accused had made to the police after a charge of assault causing grievous bodily harm had been brought, and where the charge was subsequently increased to one of capital murder.

In connection with *McKie's* case, it may be noted that medical evidence in section 15 cases can only be competently taken in Scotland in accordance with the rules laid down in the well-known case of *Reid* v. *Nixon*.[4] These rules provide that before examination is sought, the accused should be (1) asked for his consent to the examination, (2) advised that he need not submit to it, but that the result of the examination may be used in evidence, and (3) advised that he may call a doctor of his own choosing and be given facilities for so doing.

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[2] 1958 S.L.T. 152; [1958] Crim.L.R. 386.

[3] 1958 S.L.T. 167.

[4] 1958 J.C. 68.

The medical evidence in *McKie's case* was regularly obtained under this procedure, but the accused appealed on the ground that if he had known at the time that the more serious charge of culpable homicide was to be preferred against him, he might have refused his consent to medical examination, or made further efforts to obtain evidence favourable to himself. It was also argued that the examination under section 15 procedure was a specialty, and should not be used in connection with common law charges.

McKie's appeal was dismissed on the ground that it would not be unfair to him in the circumstances to allow the evidence on the graver charge to stand. The Lord Justice Clerk said that the case raised the familiar problem of reconciling the interests of the accused and of the general public. The public interest might be hindered where, through no fault of the police, the more serious charge could not be preferred at the time, for example, where the victim of a murderous assault or a reckless driving accident survived for some days thereafter. In the present case, however, said his Lordship, it did not appear that the accused had suffered any real prejudice. The procedure for obtaining medical evidence for section 15 charges provided *additional* safeguards to the accused, and the accused could hardly complain if that evidence was subsequently used on a graver charge.

In *Graham's* case, the accused made a statement on being charged with assault causing grievous bodily harm, and after the victim had subsequently died, the charge was increased to capital murder. Lord Sorn ruled that in the circumstances, evidence of the statement should not be allowed on the murder charge. The authority on this point is conflicting. Such evidence was refused in *H.M. Advocate* v. *Stewart*,[5] but allowed in *H.M. Advocate* v. *Cunningham*,[6] where, however, the earlier precedent was not put before the court. Lord Sorn, in refusing to allow the evidence, said that he did not propose to lay down any general rule in the matter; he was thinking only of a man standing on a charge of capital murder, and was by no means suggesting that every statement made in reply to a lesser charge should be inadmissible in a trial on a more serious charge.

The question of fairness to the accused in connection with the *Reid* v. *Nixon* procedure on section 15 charges also arose in *Taylor*

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[5] (1866) 5 Irvine 310.

[6] 1939 J.C. 61.

v. *Irvine.*[7] The ground of appeal was that the accused had never been specifically informed that he was not compelled to submit to a medical examination, although he had stated, when asked, that he had no objection to such an examination. The court dismissed the appeal, holding that it was clear on the evidence that the accused was quite aware of his right to refuse examination.

In *H.M. Advocate* v. *Hepper,*[8] fairness to the accused was also considered. The accused was charged with housebreaking and with stealing thirty-six bottles of whisky and an attaché case. The house of the accused had been visited by the police on a matter unconnected with the housebreaking, and the accused had consented to a search on that occasion. The attaché case had come to light during this search, and this discovery led to the charge being subsequently made. Lord Guthrie held that, even if the evidence had been illegally obtained, it was still admissible in view of the interest of society in the detection of crime, and it was not a breach of the principle of fairness to the accused to exclude it.

Appeals against sentence

Numerous appeals against sentence have been made to the High Court of Justiciary in 1958, most of which have been conducted by the accused themselves, after having been advised by counsel that there was no merit in their appeal. Two appeals raised points of some importance.

In *Fleming* v. *MacDonald*[9] the question of law for the court was whether a certain sentence in a summary trial was excessive in the circumstances. The court refused to answer the question as put, holding that the proper criterion for complaints under the Summary Jurisdiction (Scotland) Act, 1954, was not whether the sentence was excessive, but whether it was " harsh and oppressive."[10] The actual circumstances in which sentence was imposed were as follows: The accused, who had never been in trouble with the police before, pled guilty to a charge of theft from his employers. The total amount of goods stolen over a period was £67, but the loss had been made good. The stolen goods had been received by two other persons who had been subsequently convicted. The accused was sentenced to three months' imprisonment, but the Appeal Court was not told of the sentences which were passed on the receivers. It was therefore impossible to determine whether the accused's sentence was fair and just in comparison with the others. The Appeal Court accordingly reframed the question of law before them, and held that the sentence of three months was not harsh and oppressive in the circumstances.

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[7] 1958 S.L.T. 15; [1958] Crim.L.R. 262.

[8] 1958 S.L.T. 160.

[9] 1958 S.L.T. 108.

[10] For a definition of this expression, see *Stewart* v. *Cormack,* 1941 J.C. 73.

The part played by George Grey, the " Monocled Major," in the £44,000 bank robbery in Glasgow in 1955, was the subject of an appeal in *Grey* v. *H.M. Advocate*.[11] In 1955, Grey began a period of seven years' imprisonment in an English prison for crimes committed in England. He was imprisoned before he was charged with his part in the Scottish bank robbery. The Crown in Scotland has no power to compel an accused to stand his trial in Scotland while serving a sentence in England, unless the accused applies to be transferred to a Scottish prison. This Grey duly did, hoping, no doubt, to receive a concurrent sentence if he pleaded guilty. In fact he received a sentence of a further six years' imprisonment, to run from the expiry of the English sentence. He appealed on the ground that it was incompetent to date sentence from the expiry of a previous sentence imposed by an English court. This argument was rejected, and Lord Clyde said: " This court is not restricted by technicalities of that nature in performing one of its main functions, namely, the securing of an appropriate penalty for crimes committed and prosecuted here (in Scotland)."

The purpose of corrective training

Many people think that the law has become too gentle towards criminals nowadays. In particular, systems of probation, corrective training, and deferred sentences have been criticised as being of little value in reforming criminals. Those who consider the law takes too lenient a view should note the observations of Lord Clyde on the purpose of corrective training, which he expressed in *Winning* v. *H.M. Advocate*.[12]

In this case, the accused, who was undergoing a period of four years' corrective training, escaped from custody and while at large committed offences of theft and housebreaking. On his apprehension he was charged and pled guilty, and was sentenced to three years' imprisonment. The term of imprisonment outran the remainder of the period of corrective training, and the effect of the sentence was to cancel the remaining period of training. The accused appealed, but it was held that such a sentence was competent.

Lord Clyde said that the problem created by the commission of a fresh crime during the currency of a period of corrective training was not an easy one to solve. Although the fresh crime had to be punished, the whole object of corrective training was to improve the character of the trainee and fit him to take his part in the ordinary life of the community; to impose a sentence of imprisonment to start from the end of the training would be likely to frustrate the whole object of the training. Nevertheless, corrective training was only to be given on the assumption that the person convicted was likely to benefit from it, and if a person absconded and committed further crimes during the training period, then there was not much object in continuing it. In such circumstances, therefore, there would be nothing to prevent the court from imposing a fresh sentence of imprisonment which would run concurrently during the period of corrective training, and might, if necessary, continue for a further period after its termination.

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[11] 1958 S.L.T. 147.

[12] 1958 S.L.T. 135.

The effect of this decision is similar to that in *R.* v. *Hedgecock*,[13] where the Court of Criminal Appeal held that it would not be proper to impose a sentence of imprisonment to begin on *expiry* of a sentence of corrective training, but that the sentence of imprisonment should replace the sentence of corrective training.

The need for corroboration

It is a general principle of Scots law that in a criminal case legal proof may be supplied either by two witnesses to the material facts, or by one witness corroborated by facts and circumstances. However, where the accused is charged with a series of offences of similar nature which indicate a settled course of criminal conduct, and each offence is spoken to by only one credible witness, then each single offence may be taken as corroborating the other, and the whole series are considered as proved. This doctrine was first enunciated in *Moorov* v. *H.M. Advocate*,[14] and was recently applied in *Harris* v. *Clark*.[15]

The accused in *Harris* v. *Clark* was charged with receiving certain articles, all of which had been stolen from the same warehouse over a period of a year. (The nature of the stolen articles seem to indicate that the accused had a tendency to hypochondria; they included Askit powders, Beecham's powders, Uneeda powders, Rennies tablets, Aspro tablets—and six dozen packets of chewing gum!) Three youths, each employed in the warehouse, gave evidence of separate conversations with the accused, when he had urged or acquiesced in the theft of articles by them. The youths, following such a conversation, stole the goods on separate occasions, and delivered them to the accused. The accused appealed on the ground that the offences were not sufficiently related in time to allow the *Moorov* doctrine to apply. In any event, it was argued, the doctrine was primarily applicable to sexual offences (as in *Moorov*), where the nature of the offence was of such a private character as to preclude corroboration in the ordinary way.

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[13] 41 Cr.App.R. 136.
[14] 1930 J.C. 68.
[15] 1958 S.L.T. 105; [1958] Crim.L.R. 476.

The court held that there was sufficient unity and similarity between the offences to indicate a settled course of criminal conduct on the part of the accused, and sustained the conviction. It may be pointed out that the *Moorov* doctrine has been extended to cover offences of sexual assault, assault, incest, bribery, theft, and most recently, receiving stolen goods. There is no doubt that, on principle, it may be extended to cover other types of crime as well.

The question of corroboration also arose in *Connolly* v. *H.M. Advocate*.[16] In that case the accused was tried and convicted of theft. It was proved in evidence that he gave a voluntary statement to the police as to how he and another had perpetrated the theft. There was independent evidence that he had been acting suspiciously in a motor-car on the night of the theft in the vicinity of the house where the stolen goods were found. The accused appealed on the ground that there was not sufficient corroboration of his voluntary confession. The court rejected this argument and refused the appeal. This case serves to show that where the accused pleads not guilty at his trial, once evidence has been competently led of a previous confession by the accused, very little further corroboration is necessary.

A question of corroboration of evidence was one of several points which arose in the appeal in *Manuel* v. *H.M. Advocate*.[17] In his confession to the murders Manuel indicated where one of the corpses would be found. The corpse was subsequently found in the place to which the police had been directed by the accused. It was argued that the finding of the body was not an independent fact corroborating the confession. The court rejected this argument, and held that the accused's confession and the finding of the body were sufficient to convict him on the particular charge of murder relating to that deceased.

The nature and status of precognitions

The present-day meaning of a " precognition " is a statement made by a person during the course of an investigation. In a criminal case, possible witnesses are called upon by the Procurator

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[16] 1958 S.L.T. 79.

[17] 1958 S.L.T. (Notes) 44.

Fiscal to attend to give a precognition, which when completed is passed to the Crown Agents for the instructions of Crown counsel whether or not the prosecution is to proceed.

It is now settled that a precognition, made by a person who is subsequently charged with a criminal offence in the matter to which his precognition relates, cannot be taken against him at his trial. The reason for this is, that the persons who take the precognition (*i.e.*, the police officers) are usually searching for evidence to prove crime, and what they note down or afterwards remember is apt to be coloured by their desire to make out a good case. However, this rule will not prevent evidence from being led as to statements made by witnesses during a routine inquiry, before the suspicion has fallen in any particular place. There is a clear distinction between (1) persons merely being questioned by the police in the execution of their duties in the investigation of a crime, (2) persons detained on suspicion, and (3) persons charged with a crime and in custody awaiting trial.[18] In the second and third categories, statements taken from these persons amount to precognitions and cannot be led in evidence—unless, of course, the statements are voluntary and are made after the proper cautions have been administered.

The status of precognitions was discussed in *Kerr* v. *H.M. Advocate*.[19] In this case, three men were charged by the police with housebreaking. On the day after they were charged, their employer, who was later to be called by the accused as a defence witness, made a statement to the police. At the trial the employer gave evidence to facts which differed materially from his previous statement, but the statement itself was read out by the police officer who had noted it down. The accused appealed on the ground that the statement should not have been allowed in evidence and was incompetent. The court held that as the accused had been charged before the statement had been made, police inquiries had passed from the stage of investigation to actual preparation of the case, and the statement was therefore of the nature of a precognition, which was inadmissible. The conviction was accordingly quashed.

Are there any circumstances in which a statement made upon precognition may be competently used to contradict the evidence which the same witness subsequently gives in court? This difficult question is not conclusively settled, but the modern view supported by the institutional writers, Hume and Alison, is that precognitions may not be so used. Some difficulty may be caused, however, by the interpretation of section 3 of the Evidence (Scotland) Act, 1852, which provides that it shall be competent to examine any witness as to whether he has previously made a statement different to that now made in the court proceedings.

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[18] See *Bell* v. *H.M. Advocate*, 1945 S.L.T. 204.

[19] 1958 S.L.T. 82; [1958] Crim.L.R. 387.

The Criminal Proceedings Act, 1865, ss. 4 and 5, make somewhat similar provisions for England. The English Act was recently considered in *R.* v. *Hart*,[20] where the court held on appeal that it was competent to put to the witness that he had made a previous contradictory statement. It would appear that the rule of Scots law in this matter is stricter, and statements may be put in evidence in English courts for purposes of contradiction where they would be disallowed in Scotland on the ground that they were precognitions.

Police speed traps

Disputes between motorists and the police on charges of exceeding the speed limit continue to find their way into the Appeal Courts. There can be no doubt that if the rules of evidence are strictly applied to the methods used by the police to determine the speed of motor-vehicles, the Crown in Scotland may have a difficult job to prove their case. This is illustrated by *Houston* v. *Leslie*.[21] The accused was charged with exceeding a 30 m.p.h. speed limit, and the evidence was as follows: A vehicle had been driven through the measured distance in front of the accused's car at a speed of 44 m.p.h. One policeman gave evidence that the accused's car was 50 yards behind his vehicle at the point of entry, and another policeman said that it was only 20 yards behind at the point of exit. Both officers said that the accused's car had been gaining on the vehicle. If that was held proved, the obvious inference was that the accused had been driving faster than 44 m.p.h., and he was accordingly convicted. The conviction was quashed on appeal, the court holding that the possibility of error on the part of one or both of the policemen was so great as to justify a verdict of " not proven."

The strictness of Scots law on this matter may also be illustrated by considering the case of *Nicholas* v. *Penny*,[22] where a Divisional Court held that the accused might be properly convicted of exceeding the speed limit, on the evidence of one police officer who spoke to the reading on a speedometer, and where there was no admissible evidence as to the accuracy of the instrument. Such a case in Scotland would require two witnesses to speak to the reading, and it is also the accepted practice for the Crown to prove by two witnesses the accuracy of the instrument.

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[20] [1958] Crim.L.R. 133.

[21] 1958 S.L.T. 109; [1958] Crim.L.R. 477.

[22] [1950] 2 K.B. 466.

How the cat jumped

Radar speed meters were recently introduced to Scotland by the Renfrewshire police. The first case which was defended resulted in acquittal for the motorist, the judge (Sheriff Hook) holding that the meter was a "rather unreliable machine." The Crown appealed, but for technical reasons the case did not proceed. However, the Solicitor-General, appearing for the Crown, hinted darkly that it should not be thought that motorists had been given "the green light" in areas where radar control was operating. Lord Sorn asked whether the police force would be obliged to sell their radar equipment. Replied the Solicitor General: "Fortunately, they only had it on hire. They wanted to see how the cat jumped."

A SCOTS ADVOCATE.

Taking Other Offences into Consideration – Conviction for "Considered" Offence

By R. D. MARGRAVE-JONES, LL.B.

The principle of a comprehensive sentence, covering both the substantive crime for which the prisoner stands convicted, and also other offences which he wishes to be taken into consideration, has become an important feature of our criminal law. The advantages of this procedure are quite evident in most cases. The accused is encouraged to make a full confession of his misdeeds, so that he may receive a comprehensive sentence, enabling him to make a fresh start in life on his release from prison. Multiplicity of proceedings is avoided, with a consequent saving of court costs and of the attendance of witnesses.

But a major defect in a system which has otherwise worked well without legislative sanction, threatens to stifle any further expansion of the practice. A number of pronouncements by the High Court have made it clear that taking an offence into consideration is in no sense a conviction for that crime.[1]

This ruling causes difficulties in a number of circumstances:

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[1] *Nicholson* [1947] 2 All E.R. 535; *Neal* [1949] 2 K.B. 590.

Under the Road Traffic Acts

The courts appear to regard the provisions of the Road Traffic Acts relating to disqualifications and indorsements as being of great importance for the safety of the public and only incidentally punitive. Section 6 (1) of the Road Traffic Act, 1930, as amended, empowers "any court before which a person is convicted" of any offence specified in the Fourth Schedule to the Road Traffic Act, 1956, to order disqualification or indorsement of that person's licence. Thus in *Collins* [2] where the trial judge, when sentencing the accused for offences involving dishonesty, took into account a charge of driving a motor-car while under the influence of drink, the Court of Criminal Appeal pointed out that the judge had had no power to disqualify the defendant from holding a licence, because the latter had not actually been convicted of a driving offence. Lord Goddard laid down "that, for the future, offences under the Road Traffic Acts for which a disqualification or the indorsement of a licence is imposed, are not proper cases to be taken into account when passing sentence for dishonesty or some other matter." The Lord Chief Justice did, however, consider that "if a man is charged on indictment with an offence under the Road Traffic Acts for which he is liable to be disqualified, and there is a second charge against him for the same class of offence, the court might take that into account."

The reason for this decision appears to be that, since there was no conviction under the Road Traffic Acts, the court was unable to carry out its duty to protect the public against incompetent or careless drivers.

In *Simons*,[3] quarter sessions convicted the accused of, *inter alia*, theft and dangerous driving and took into account a charge of driving while disqualified. The court imposed a sentence of three years' corrective training, but it could also have ordered a period of disqualification for holding a licence by virtue of the conviction for dangerous driving. In view of the opinion of the court in *Collins'* case that a second charge for the same class of motoring offence might be taken into consideration, it would seem that quarter sessions in the present case could have imposed a disqualification period based on the conviction for dangerous driving but which, in fact, took into account the outstanding offence of driving while disqualified. Nevertheless, the Court of Criminal Appeal disapproved of the course taken by quarter sessions and reiterated its view expressed in *Collins* that motoring offences ought to be prosecuted separately. Apparently, if the defendant Simons had been convicted of dangerous driving only, the other motoring offence could have been taken into consideration.

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[2] [1947] K.B. 560.

[3] [1953] 2 All E.R. 599.

If legislation were introduced to provide that an offence taken into consideration should rank as a conviction, any number of similar motoring offences could be taken into account with the main offence.

Concerning probation and recognisances

Before 1948, no conviction was recorded against the offender in courts of summary jurisdiction when a probation order was made, but now a " conviction " is registered both in summary and indictable cases. Section 12 (1) of the Criminal Justice Act, 1948, provides that " a conviction of an offence for which an order is made under this part of this Act placing the offender on probation or discharging him absolutely or conditionally shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of any subsequent proceedings which may be taken against the offender under the foregoing provisions of this Act."

In *Tarbotton*,[4] however, the Court of Criminal Appeal had held that it was permissible, with the consent of a superior court if necessary, to take into account a breach of recognisance under the Probation of Offenders Act, 1907. Thus, in spite of the special " convictions " introduced by the 1948 Act, courts continued to take breaches of probation orders into consideration, as advocated by *Tarbotton*. This procedure was used by quarter sessions in *Webb*,[5] but the Court of Criminal Appeal decided that the trial court had acted wrongly in taking a breach of probation into account. Lord Goddard pointed out that a separate sentence, even, in a proper case, a concurrent sentence, should have been given, so that, under the proviso to section 12 (1), that offence in future could rank as a conviction for the purposes of subsequently imposing corrective training or preventive detention. No comment was made regarding *Tarbotton's* case but, in view of this later ruling by Lord Goddard, it is very doubtful whether a breach of recognisance may now be taken into consideration.

Semble, a breach of conditional discharge should be treated in the same way as a breach of probation. When Terry Dene, the singer, was convicted recently on charges of committing malicious damage to property, the magistrates were asked to take into account a breach of conditional discharge relating to a similar offence, but instead they fined the defendant for the original offence.[6]

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[4] [1942] 1 All E.R. 198.

[5] [1953] 2 Q.B. 390.

If, however, breaches of probation or of conditional discharge were made to rank as special convictions under section 12, they might adequately be taken into consideration.

Limitation of sentence

A further difficulty, caused by the fact that a "considered" offence is not registered as a conviction, arises when the question of a sentence is being decided by the judge. The Court of Criminal Appeal in *Tremayne*,[7] held that "outstanding offences" may not be the subject of an additional penalty but are to be taken into account by the court in determining what sentence to impose within the prescribed maximum for the actual charge on which the accused has been convicted. In this case Tremayne pleaded guilty to a charge of obtaining credit by fraud (for which offence the maximum sentence was twelve months' imprisonment with hard labour), and asked for twelve other offences, including six of theft, to be taken into consideration. Quarter sessions acceded to his request and imposed a sentence of twenty-one months' imprisonment with hard labour. The Court of Criminal Appeal reduced this term to the statutory maximum and stated that the twelve outstanding cases should be deemed to have been taken into account.

In a similar case, where a trial court had sentenced the accused to three years' penal servitude for attempted housebreaking and had taken two charges of housebreaking into consideration, the Court of Criminal Appeal was obliged to substitute for this term a sentence of two years' imprisonment, the prescribed maximum for attempted housebreaking.[8]

Cases like those of *Tremayne* and *Hobson* are a reminder that however desirable it may be to ensure that everything outstanding is dealt with when an offender is sentenced, it is quite as important that justice should be done. Although a judge purports to take other charges into account, he may not be able to do so in a way which he considers adequate.[9] A procedure which merely gives a person a "clean sheet," without allowing for the possibility of adding to the punishment awarded for the offence for which the accused stands convicted, is open to the grave objection that it tends to encourage a persistent wrongdoer to continue his career of crime on the principle of "the more the merrier."

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[6] *The Times*, February 22, 1958.

[7] (1932) 23 Cr.App.R. 191.

[8] *Hobson* (1942) 2 Cr.App.R. 30.

[9] See also the remarks of Cassels J. in *Moorin* (1940) 4 Journ.Crim.Law 177.

Here again, the introduction of legislation making an outstanding charge which is taken into consideration operate as a conviction, would be advantageous; there would be nothing to prevent the judge imposing the full sentence for that offence. At present, however, prosecuting authorities have to ensure that the accused is tried formally on a sufficient number of charges to empower the court to pass a sentence which effectively takes "other offences" into account.

Obtaining restitution and compensation

Section 45 of the Larceny Act, 1916, empowers a court to make an order for the restitution of stolen property, and for a sale of the proceeds thereof, where an offender "is prosecuted to conviction." It is hard to see how proceedings which merely allow outstanding offences to be taken into account can be within the meaning and intent of that section. It would seem that, whenever possible, offences involving stolen property should be charged by the prosecution as substantive offences and not left to be taken into consideration.

A case illustrating this particular difficulty came before the Recorder at Doncaster in 1957. A young woman, who admitted having stolen £1,145 from her employer, was given a conditional discharge on charges of larceny amounting to £576. The rest of the money was involved in cases which she had asked to be taken into consideration. Since all the money in the charges was accounted for, the Recorder could not make an order relating to the other £569, and the woman was allowed to collect from the police £200 worth of clothes which she had admitted that she had bought after the theft.[10]

In this connection it should also be noted that it is only when a court actually *convicts* a person of a felony that compensation may be awarded for the loss of property suffered as a result of the felony.[11] If, however, statutory provision were made for charges taken into consideration to be registered as convictions, there would be no objection to the use of the procedure in offences involving property; restitution orders could be made and compensation given to the victim of a felony in these cases.

Plea of autrefois convict

At present, it is doubtful whether an accused person may raise a successful plea of *autrefois convict* if subsequently prosecuted for offences which have been taken into account. The Lord Chief Justice stated in *Nicholson*[12] that "in the normal case no proceedings would follow upon any outstanding cases, for the reason that they had been taken into consideration, not because there had been convictions in respect of them." By a kind of gentleman's agreement, prosecuting authorities forgo proceedings in respect of the outstanding charges in return for a full confession of all offences by the criminal. When the accused is dealt with in this way, however, he faces the risk of receiving an increased sentence. It was for this reason that Lewis J. upheld a plea of *autrefois convict* where a prisoner was prosecuted for an outstanding offence after his conviction on the main charge had been quashed on appeal.[13]

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[10] *Daily Express*, November 7, 1957.

[11] Forfeiture Act, 1870, s. 4; Magistrates' Courts Act, 1952, s. 34.

As a result of the decision of Lewis J. in *McMinn's* case, courts of trial and prosecuting authorities were less inclined to allow offences to be taken into consideration.[14] If the basic conviction were one which might possibly have been upset on appeal, a self-confessed criminal with a long list of outstanding offences might have escaped punishment altogether. Thus the Court of Criminal Appeal in *Nicholson*, seized the opportunity of saying that "though the question has not been argued before us, we have considered the arguments and the judgment in *McMinn's* case, and we are all strongly of opinion that it ought not to be followed in future cases, at least until it has been considered by this court." This opinion was again stated in *Neal*,[15] *per* Lord Goddard C.J.: "It is clear that *autrefois convict* cannot be pleaded where cases have been taken into consideration but the substantive conviction has afterwards been set aside."

It may be argued that these *obiter dicta* of the Appellate Court apply only where the basic conviction has been quashed, so rendering inoperative the prisoner's request to have other offences taken into account, and that, if the conviction is not set aside, a plea of *autrefois convict* in respect of the other offences can be established. On the other hand, a "conviction" is obviously an essential element in the plea of *autrefois convict*. Although a conviction need not necessarily be followed by a sentence,[16] it would seem that it does presuppose a power to pass an independent sentence for the offence. In the case of outstanding charges, there is no such power.[17]

In practice, however, further prosecutions for offences already

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[12] [1947] 2 All E.R. 535.

[13] *McMinn* (1945) 109 J.P. 130. *Contra*, the directions of the trial judge to the jury in *Browne* (1943) 29 Cr.App.R. 126.

[14] 109 J.P. 130.

[15] [1949] 2 K.B. 590.

[16] *Sheridan* [1937] 1 K.B. 223.

[17] *Tremayne*; *Hobson*.

" considered " are instituted only where the interests of justice so demand—as in *McMinn's* case. To obviate any possibility of a mistake being made in this respect by the prosecuting authorities, care should be taken to ensure that the indorsement on the indictment and the entry in the register set out with sufficient particularity the offences taken into account.

Nevertheless, the most satisfactory solution would be for " considered " offences to be regarded as convictions. Legislation to this effect would enable outstanding charges to be disposed of with finality.

Recommendations

An attempt has been made in this series of articles,[18] to show that although the taking into consideration of outstanding offences is beneficial to the public and assists the reformation of the criminal, statutory sanction for the practice would be generally welcomed.

It is suggested that this method of dealing with outstanding offences should be confined to the consideration of crimes similar to the one charged. Confirmation is needed that courts of summary jurisdiction may employ the procedure both for indictable offences tried summarily and for summary offences.

In particular, it is recommended that outstanding charges which are taken into account should rank as convictions. For the purposes of record, however, it would seem advisable for the " other offences " to be framed as though they were specific charges. In view of *McMinn's* case, special provision should be made where offences are taken into consideration on a charge which is subsequently disposed of on appeal.

Is it too much to hope that the view of the Home Secretary in 1896, now endorsed by Lord Goddard, will at last be accepted when the next Criminal Justice Act is framed?

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[18] [1959] Crim.L.R. 18, 108.

The Street Offences Bill

Two Views

A lawyer's viewpoint

This Bill is the result of the deliberations of the Wolfenden Committee (Cmnd. 247 of 1957) in so far as it related to prostitution. Nevertheless, certain of the clauses do not follow from the recommendations of that Report.

Clause one implements the main recommendation in this connection. It removes the need for proving annoyance to a passenger or inhabitant, but retains the phrase common prostitute, who commits an offence if loitering or soliciting in a street or public place for the purpose of prostitution. Presumably, the common prostitute could be male or female.

In the debate on the second reading of this Bill on January 29, 1959, the Home Secretary mentioned the introduction of the system of cautioning by a police officer on at least two occasions before a charge is preferred. The primary object of cautioning was to give the offending person a chance to alter her ways or at least to seek assistance. For technical reasons it was not proposed that the person cautioned should be required to go to a police station for that purpose. Although the method of enforcing this procedure must presumably await the Committee stage of the Bill, it is not intended that there shall be any amendment to the present wording. Moreover, this cautioning system is not to be a constituent of the charge, namely " common prostitute." There are many difficulties involved here, such as the evidence required by the court for this offence and the difficulty of recognising a prostitute who has changed both the district of operation and her name.

Having regard to the change in the nature of the offence the retention of the word " loitering " would seem to be regrettable, though of course the purpose would also have to be proved. A street for the purpose of this section is widely defined; but on the face of it the Bill would not cover the use of taxis or private cars to the annoyance of passengers or inhabitants.

The increase of the penalties are the main features of the Bill. This involves an increase of the fine that can be imposed for soliciting and after a third or subsequent offence a sentence of up to three months' imprisonment in addition to or alternative to a fine. Apart from the wisdom or otherwise of sentencing these offenders to imprisonment, this additional power will enable the court to make certain that a person, who is suspected of having contracted venereal disease, is treated or medically examined.

The problem of males persistently importuning for immoral purposes can, in future, be considered to be within the Sexual Offences Act, 1956, s. 32. The debate implied that this is the wider construction to be put upon this section. For many years this section and its predecessors were interpreted as applying to males importuning other males.

Clause two is in response to public pressure and is not based on the recommendations of the Wolfenden Report. It would appear to be inconsistent with the purpose of the Bill which is to take prostitutes off the streets so that they ply their trade in less public places. It is directed against all-night cafés and refreshment houses and increases the penalties, imposed under existing statutes, on a proprietor for allowing, *inter alia*, prostitutes to assemble there. In particular, on a first conviction, instead of on the second or subsequent one, the court can order the forfeiture of the refreshment houses' licence and disqualify the proprietor or premises.

Contrary to the opinion of the majority of the Wolfenden Committee, clause three increases the maximum period of imprisonment for a man, living on the earnings of prostitution, and for a woman, exercising control over a prostitute, from two to five years. Again, this is in response to public pressure. The Wolfenden Report expressed the view that when the present law was framed the prostitute may have been in some danger of coercion ; " but today, either through the effectiveness of the law or through changes which have removed some of the economic and social factors likely to result in a life of prostitution, she is in less danger of coercion or exploitation against her will " (para. 304).

If this Bill becomes law in its present form, its interpretation by the magistrates and the police will be watched with interest. In essence clause one does little to alter the present offence, except to remove the word annoyance. However, clause one, sub-clause two does allow a constable to arrest on suspicion " with reasonable cause." This in itself could have a very real nuisance value to the prostitute, quite apart from the increased penalties. Clearly, it does place a heavy responsibility on the police in exercising this power. [T. E. JAMES.]

A police viewpoint

The second reading of the Government's Street Offences Bill on January 29 produced several points of interest to magistrates, police officers and indeed all concerned in the enforcement of the criminal law.

The first point was the emphasis placed by the Home Secretary on the purpose of the Bill. It was not, he explained, designed to make prostitution illegal, nor to provide a cure for it, but merely to help clear the streets of what is undoubtedly a nuisance. It was plain that much of the criticism of the Bill was based on disappointment that it had such a limited and practical intention, and did not attempt to get down to the roots of the problem. Prostitution, the Government might have replied, may be a social affair, but street nuisances are a police affair. It may or may not be true, as is sometimes said, that the streets of London are worse in this respect than those of any other capital city in the world. But it is obvious that streets in certain parts of London do provide a shoddy nightly spectacle. It is equally clear that prostitutes, like the rest of mankind, will continue their public offences just as long as they are profitable; and they will stop them just as soon as they cease to be worthwhile.

This leads to a second point that must have interested police officers in particular. The member for Nottingham Central told the House of the steps taken, apparently successfully, by Nottingham City Police to clear the streets of the nuisance. One way, it seems, has been to concentrate police attention on men who haunt the streets soliciting prostitutes, and to prosecute them under section 32 of the Sexual Offences Act of 1956. Men, it appears, are more sensitive to the disgrace of a court appearance than are prostitutes. Another way has been for the magistrates to bind prostitutes over, under the Justices of the Peace Act of 1361, in sums of up to £75, with estreatment on a subsequent offence, and imprisonment in default of payment. Such measures as these, it is claimed, have practically cleared the streets of Nottingham; and this one can well believe.

Still a third point was the opposition to the continued use of the term "common prostitute." Despite the arguments of the Wolfenden Committee, some members still felt that its use in the wording of a charge would disclose a woman's character as effectively as reading out her previous convictions. But the Government successfully argued that the inclusion of the term served to protect women who were not common prostitutes but whose innocent actions might lead them to be wrongly suspected of soliciting.

A final point was the informal caution which the Home Secretary is to institute in the Metropolitan Police District. Here again it was argued that knowledge of the existence of a system of police caution before arrest would be equivalent to putting in a woman's previous convictions. But the Home Secretary put great faith in it as providing an opportunity for beginners to mend their ways. If the Bill becomes law, it will be interesting to see how many Chief Constables decide to institute the system of cautioning in their own areas. [CHRISTOPHER WILLIAMS.]

Practice and Procedure

"First Offenders"

When a conviction which is not a conviction is a conviction

What passes as a "first offence" in court is very often not a first offence in fact; and, in law, a first conviction will frequently not count as a conviction, because section 12 of the Criminal Justice Act, 1948, enacts that, if it is followed by a probation order or an absolute or conditional discharge, it "shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of any subsequent proceedings which may be taken against the offender under the foregoing provisions of this Act."

The effect of section 1 (3) of the First Offenders Act, 1958, is that subsequent proceedings to which that Act may apply are added to those in which such a conviction loses its exemption from the normal consequences of a conviction. The relevant words of the section are "the question whether he has been so (previously) convicted shall be determined without regard to section 12 of the Criminal Justice Act, 1948." It would have been anomalous, to say the least of it, if a defendant, on a second conviction, had been able to claim the status of a first offender merely because he had been dealt with leniently on the first occasion.

Another set of circumstances in which lenient treatment for an offence will not release the accused from the ordinary results of having been convicted presents the converse situation—the effect of a second offence on a first. Suppose that a person who has been put on probation or conditionally discharged commits a further offence during the currency of the order in question. It will sometimes happen that the court which convicts him of the further offence will discharge him absolutely or conditionally, or even make a fresh probation order. Such an adjudication will not, however, take him outside the operation of section 8 of the Criminal

Justice Act, 1948, which renders the subject of a probation or conditional discharge order liable to be dealt with in respect of the original offence if he is "convicted" of a further offence while the order is still in force. For, by the terms of section 12 (quoted above), an order of this nature does not prevent the conviction on which it was founded from being deemed a conviction in "any subsequent proceedings which may be taken against the offender under the foregoing provisions of this Act."

It is not uncommon in modern legislation to find that something, for certain purposes, is deemed to be not what it is. This may be a convenient drafting device, but it leads often to further linguistic acrobatics when subsequent legislation has to be formulated. The final result rarely provides courts with a statement of law which is conveniently applicable to all the combinations of circumstances which will be encountered in practice. [A. E. JONES.]

Summary Justice

Clean air

A steamship company were fined £25 with £10 10s. costs for allowing black smoke to be emitted for an aggregate period of 57 minutes from the funnel of a cargo liner in dock at Tilbury, contrary to section 1 of the Clean Air Act, 1956. Clan Line Steamships: Grays (Essex) Magistrates' Court (*Liverpool Echo*, January 16, 1959).

Merchandise marks

A firm of drapers was fined a total of £170 with 75 guineas costs after pleading guilty to six summonses under the Merchandise Marks Acts, 1887 to 1953. The firm was fined £75 on one of four summonses relating to an advertisement falsely describing trousers as "Terylene" which, in fact, contained approximately 15 per cent. "Terylene" to 85 per cent. rayon when the makers of "Terylene" specified a minimum of 67 per cent. content of polyester fibre before a fabric could be offered for sale as containing "Terylene": on one of two summonses relating to the sale of trousers at the "bargain" price of 39s. 6d. while advertising that their usual price was 70s. or 80s., when their saleable value was 39s. 6d. the firm was fined £75: a fine of £20 was imposed for the remaining four offences. Phillips: Southampton Magistrates' Court (*Financial Times*, January 22, 1959).

Case and Comment[*]

ATTEMPT

Attempted rape—change of heart before apprehension

R. v. Lankford

Court of Criminal Appeal: Lord Parker C.J., Donovan and Ashworth JJ.: January 12, 1959: *The Times,* January 13, 1959.[1]

L. was convicted at quarter sessions of attempted rape; he pleaded guilty on another count to assault with intent to ravish. He was sentenced to five years' imprisonment on the charge of attempted rape and to two years' imprisonment on the charge of assault. At the trial it was proved (and admitted by the defence) that L. had knocked down with his hand an old lady of seventy-eight years of age, had knelt over her and taken out his person. Somebody passing heard the old lady shout, came to the scene and at that time L. got up and ran off. The defence was that L., when he was kneeling over the old lady, had a change of heart and was already getting up to go away when the other person came up. The recorder, summing up to the jury, said *inter alia*: "Whether he desisted or not, it is still an attempt to rape her." L. appealed to the Court of Criminal Appeal against his conviction upon the main grounds of misdirection and of interruptions and interventions by the recorder.

Held, allowing the appeal, that the recorder had entered the arena throughout, taking whole passages of the examination of witnesses and of the cross-examination of the accused out of counsel's hands in a manner clearly hostile to the accused, so that nobody listening to the trial could have felt that L. had a fair trial; that need not be a ground for quashing the conviction but this court felt that it must record that the way in which the trial had been conducted was deplorable. The real point of the case, as it seemed to this court, was that the prisoner's defence was never put to the jury. It was only right to say, without laying down what constituted attempted rape, that there were, in this case, acts which, taken by themselves, would have entitled the jury to come to the conclusion that there was an attempted rape. But L.'s defence was that, having done the acts, he had a change of heart and desisted and, so far from putting this defence, the recorder said, in effect, that even if L.'s case were true there was nevertheless an attempt. This court could not agree with that view of the position. In deciding whether an attempt had been committed in any case all the facts must be put before the jury. In some cases it would be open to the jury to find that a voluntary change of heart at some point in the proceedings enabled them to say that there had been no attempt; in other cases a point might be reached where, even if a man voluntarily desisted, he had already been guilty of the attempt. Much, of course, depended upon the degree of proximity of the acts in question. In the present case, therefore, L.'s defence not having been put before the jury, the conviction would have to be quashed; and, accordingly, L. would serve two years' imprisonment for the offence to which he had pleaded guilty. [H. P.]

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[*] Reported, unless otherwise stated, by David Calcutt and Henry Palmer, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the appellant: *F. W. Barnes* (instructed by Charles Lucas & Marshall, Newbury). For the Crown: *P. W. Medd* (instructed by the Solicitor, Berkshire County Council).

Commentary. It was held in *R.* v. *Taylor* (1859) 1 F. & F. 511 that a man may be found guilty of attempting to set fire to a stack of corn if he approaches it with the intention of setting fire to it and lights a match for that purpose, but abandons the attempt because he finds he is being watched. It is clearly logical to hold that, once the steps taken towards the commission of an offence are sufficiently far advanced to amount to an attempt, it can make no difference whether the failure to complete the crime is due to a voluntary withdrawal by the prisoner, the intervention of the police, or any other reason.

The Court of Criminal Appeal stated in *R.* v. *Dinnick* (1909) 3 Cr.App.R. 77 that it is " a principle of our criminal law . . . that when a defence, however weak it may be, has been raised by a person charged, it should be fairly put before the jury." This " paramount principle " has been constantly acted upon by that court. See *Archbold* (34th ed.) § 927.

CERTIORARI

Magistrates' Courts Act, 1957—*submission of defendant not read in court*

See R. *v.* OLDHAM JJ., *ex p.* MORRISSEY, p. 213, *post*, and R. *v.* DAVIS, *ex p.* BROUGH, p. 214, *post*.

CONSPIRACY

Knowledge of criminal intentions of other parties

R. v. Hawkesley

Hull City Quarter Sessions: Assistant Recorder: J. M. McLusky, Esq.: January 7, 1959.[2]

The prisoner was a partner with Z in a small taxi business. A and B, two young men with some previous criminal record, who were fairly well known to Z but less well known to the prisoner, H, persuaded H to drive them on credit from the taxi office in the centre of the city at about 12.25 a.m. a distance of about five miles to the outskirts of the city. H did not know that either A or B had criminal records. On the journey A and B informed H that the purpose of the journey was to break into a golf club. H dropped A and B near the golf club and a police officer overheard one of them say " We will want you back in about an hour." H never did return to the golf club but returned to the city where he drove some other fares which had been previously booked after which he went home taking his taxi with him.

A and B ran away from the golf club on being disturbed by the police and were later arrested together. A and B were charged with being in possession of house-breaking implements by night and A, B and H were charged with conspiracy to break and enter the club. A and B pleaded " guilty " to both counts and H pleaded " not guilty " to the count of conspiracy against him. When A and B were arrested a torch which was usually kept in the taxi was found in their possession. H made a statement to the police in writing in which he said that on the journey he learnt that A and B were " Going to do the club." The evidence as to how the torch came into the possession of A and B was conflicting. There was no evidence that H knew until the journey in the taxi had begun that A and B intended to commit a criminal offence or that he had any reason to suspect that they intended to do so. On a submission at the end of the prosecution's case the Assistant Recorder held that there was no case to answer and that there was no evidence as to conspiracy. All that had been proved was that knowledge of A and B's criminal intentions had come to H during the journey and that there was no evidence that A, B and H were acting in concert or had agreed together to commit a criminal offence. [A. W. STEPHENSON, *Barrister-at-Law*.]

Commentary. A conspiracy is commonly proved by showing that the accused acted in concert and, therefore, in pursuance of a prior agreement. As the evidence in this case appeared to show only that H knew of the intention of A and B to commit a crime and not that he agreed to participate in the commission in any way there was no evidence of conspiracy. Could H have been convicted as an aider and abettor if A and B had completed their crime? In *National Coal Board* v. *Gamble* (1958) 42 Cr.App.R. 240 it was held that aiding and abetting consisted of a positive act of assistance voluntarily done and a knowledge of the circumstances constituting the offence, the question of motive being irrelevant. Was H's continuing to drive A and B to the golf club, after he knew of their intention to commit a specific offence there, aiding and abetting? It is difficult to deny that driving the criminals to the scene of the crime is a positive act of assistance. If H had known of their intention before the journey began there could have been little doubt, it is submitted, that he would have been guilty as an aider and abettor. Should it make any difference that he learned of their intention later? In *R.* v. *Lomas* (1913) 9 Cr.App.R. 220 it was held that to return to a thief the thief's own jemmy is not aiding and abetting: " A man who hands over to another his own property on demand, although he may physically be performing a positive act, in law is only refraining from detinue." (Devlin J. in *Gamble's* case, above.) H might argue that he was only refraining from breaking the contract which he had made to carry A and B to the golf club. Of course, the contract being illegal he would no longer be bound to carry it out. But if he did not know that, he could still plead that he had no *mens rea.* As a matter of practice it would, no doubt, be difficult for a taxi-driver in H's position to turn out the criminals in the middle of a journey; but, in the absence of circumstances amounting to duress, it is not thought that this affects the strict legal position. On the other hand it would be a matter worthy of consideration in deciding whether to bring a charge.

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[2] For the prosecution: *D. S. Forrester-Paton* (instructed by F. Woodhouse, Prosecuting Solicitor, Hull). For the defence: *A. W. Stephenson* (instructed by Myer Wolff, Hull).

EXTRADITION

Fugitive Offenders Act, 1881*—appeal against order—Court of Appeal—jurisdiction*

De Demko v. Secretary of State for Home Affairs

House of Lords: Lords Reid, Tucker, Goddard, Keith of Avonholm, Birkett: *The Times,* January 23, 1959.[3]

The appellant had been arrested on charges of fraud and theft alleged to have been committed in the Union of South Africa. He made an application to the Queen's Bench Divisional Court under section 10 of the Fugitive Offenders Act, 1881. Section 10 provides: " Where it is made to appear to a superior court that . . . it would . . . be unjust or oppressive . . . to return the fugitive . . . such court may discharge" him. This application was dismissed.

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[3] For the appellant: *F. H. Lawton, Q.C.,* and *P. A. W. Merriton* (instructed by Messrs. Beach & Beach). For the Home Secretary: Solicitor-General (*Sir Harry Hylton-Foster, Q.C.*) and *Rodger Winn* (instructed by Treasury Solicitor). For the Governor of Brixton Prison: *E. J. P. Cussen* (instructed by Treasury Solicitor). For the High Commissioner to the Union of South Africa: *John Phipps* (instructed by Messrs. Jaques & Co.).

The appellant then appealed against this dismissal to the Court of Appeal. In general, by provisions now contained in section 31 (1) of the Judicature Act, 1925, no appeal lies to the Court of Appeal in any criminal cause or matter. However, section 39 of the Act of 1881 defines "superior court" as being, in England, "Her Majesty's Court of Appeal and High Court of Justice." The appellant submitted that this created a right of appeal, by way of an exception to section 31 (1) of the Act of 1925, but the Court of Appeal, in declining to accept this submission, held that it had no jurisdiction to hear the appeal. (See [1959] Crim.L.R. 54.)

Held, dismissing the appeal from the decision of the Court of Appeal, that the jurisdiction conferred on the Court of Appeal by sections 10 and 39 of the Act of 1881 was original and not appellate; the appellant could have applied in the first place to the Court of Appeal instead of the High Court, but having chosen to apply to the High Court he could not appeal from its decision. [D. C.]

Commentary. See the commentary on the decision of the Court of Appeal [1959] Crim.L.R. 54.

MAGISTRATES' COURTS

Procedure under Magistrates' Courts Act, 1957—submission of defendant not read to court

R. v. Oldham JJ., ex p. Morrissey

Queen's Bench Divisional Court: Lord Parker C.J., Streatfeild and Diplock JJ.: [1959] 1 W.L.R. 58.[4]

M. was accused of a parking offence. In accordance with the provisions of section 1 (2) of the Magistrates' Courts Act, 1957, he notified the clerk of the court in writing that he desired to plead guilty to the charge without appearing before the court, adding a submission with a view to mitigation of sentence. By section 1 (2), the court must cause any such submission to be read out before accepting such a plea. The submission was handed to the justices, but was not read out. M. was then convicted. Subsequently he applied for certiorari to quash the conviction.

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[4] For the applicant: *A. J. Irvine, Q.C.*, and *Cecil Binney* (instructed by Amery-Parkes & Co.). The respondents did not appear and were not represented.

Held, granting the application, that before the magistrates could exercise their jurisdiction under the Act, they must comply strictly with the conditions laid down in it. Even if the magistrates had read the submission to themselves, that would not suffice. Accordingly, the conviction could not stand. [D. C.]

Commentary. The 1957 Act gave the magistrates jurisdiction to accept a plea of guilty in writing for the first time. The requirement that the statement in mitigation be read out is stated as proviso (ii) to section 1 (2) and appears to be a condition precedent to the exercise of this jurisdiction.

R. v. Davis, ex p. Brough

Queen's Bench Divisional Court: Lord Goddard C.J., Cassels and Diplock JJ.: [1959] 1 W.L.R. 59n.[5]

B. was accused of causing an obstruction with a motor-car. He sent a notification and submission in accordance with section 1 (2) of the Magistrates' Courts Act, 1957. At the hearing he was present, but made no attempt to be heard. He was convicted. Subsequently he applied for certiorari to quash the conviction upon the grounds that his submission had not been read out in court.

Held, refusing the application, that it was for the applicant to prove that his submission had not been read out, and that he had failed to do so.

Per curiam: The proceedings laid down in the Act ought to be strictly followed, and nothing in the present decision affected that. [D. C.]

Commentary. In *R.* v. *Oldham JJ.* (above) the magistrates' clerk admitted that the submission was not read out in court. There appears to have been no such admission in the present case. If the submission had not in fact been read out, it is thought that the accused's presence and silence could not have cured the defect of jurisdiction.

The court is, no doubt, entitled to presume that the correct procedure was followed until some evidence to the contrary is given, for *omnia praesumuntur rite esse acta.*

SEXUAL OFFENCES

Attempt to procure act of gross indecency—written invitation—form of indictment

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[5] For the applicant: *A. J. Irvine, Q.C.*, and *John Clark* (instructed by Amery-Parkes & Co.). The respondent did not appear and was not represented.

R. v. Butters

Hull City Quarter Sessions: Recorder: P. Stanley-Price, Esq., Q.C.: January 5, 1959.[6]

The prisoner had been committed for trial on a charge of attempting to procure the commission of an act of gross indecency with another male person. He had written a letter inviting the other man to meet him for the purpose of committing an act of gross indecency and the letter was handed to the police. The prisoner and the other man met on the instructions of the police in pursuance of the letter but no indecent act took place or was attempted. The prisoner admitted to the police that he had written the letter and that he had written it with the intention of committing an act of indecency with the other man. The statement of offence in the indictment merely charged "attempted gross indecency" without reference to any statute. The particulars of offence alleged an attempt to procure an act of gross indecency. On a motion to quash the indictment it was argued that the offence was one of procuration or one of incitement and could not be the offence of attempted gross indecency and that the statement and the particulars of offence charged separate offences and were contradictory and that the indictment was bad and could not be amended.

The Recorder held that the indictment was good and that the prisoner could be charged with attempted gross indecency having regard to the words "To procure the commission by a man of an act of gross indecency with another man" in section 13 of the Sexual Offences Act, 1956, notwithstanding that the prisoner had only been charged with an attempt and had not been indicted under any statute. [A. W. STEPHENSON, *Barrister-at-Law*.]

Commentary. There can be little doubt that the facts alleged constitute an attempt to procure the commission by a man of an act of gross indecency: *R.* v. *Cope* (1921) 16 Cr.App.R. 77; *R.* v. *Miskell* [1954] 1 W.L.R. 438 and *R.* v. *Lawson* [1959] Crim.L.R. 134. It is respectfully submitted, however, that there is an important difference between an attempt to commit gross indecency and an attempt to procure the commission by a man of an act of gross indecency. The evidence which would support an indictment for the latter would not necessarily do so for the former. See the judgment of the court in *Miskell* at 441: "It is important to bear in mind that the question is not whether this invitation and meeting in the circumstances amounted to an attempt to commit an act of gross indecency. They could not be said to be that. The question is whether these acts of the appellant were acts to procure the commission of that offence."

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[6] For the prosecution: *J. S. Taylor* (instructed by F. Woodhouse, Prosecuting Solicitor, Hull). For the defence: *A. W. Stephenson* (instructed by Myer Wolff, Hull).

Under the Indictments Act, 1915, section 5, the court has power to make such amendments as are necessary to meet the circumstances of the case, unless they cannot be made without injustice.

SHOPS

Sunday trading—sugar—meal or part of a meal

Smolar v. Marshall

Leeds Quarter Sessions: Recorder: G. de P. Veale, Esq., Q.C.: January 6, 1959.[7]

S., a shopkeeper was convicted before the Leeds Stipendiary Magistrate of selling a 1 lb. packet of sugar on a Sunday contrary to section 47 of the Shops Act, 1950 (there being no partial exemption under the 6th Schedule to the Act in Leeds), and appealed against conviction to quarter sessions. For the shopkeeper, it was argued: (1) that 1 lb. of sugar was a meal or part of a meal or part of refreshment (5th Schedule to the Act; the words " part of " being used by Humphreys J. in *Binns* v. *Wardale* [1946] K.B. 451 at 458, 459); (2) that the test was not whether the food sold was capable of standing *alone* as a meal, but that if that was the test, then sugar could stand alone, *e.g.*, as refreshment to an athlete; (3) that a distinction should be made between foods consumable in the state in which they were bought, *e.g.*, bread, raw kipper, cooked meats, and foods which needed preparation, *e.g.*, flour, tea (*Binns* v. *Wardale*, and *Newberry* v. *Cohens* (*Smoked Salmon*) [1956] Crim.L.R. 426); (4) that the Shops Act, 1950, was subsequent to *Binns* v. *Wardale*, decided on the identical wording of the 1936 Act, and in spite of Lord Goddard C.J.'s criticisms in that case Parliament had not seen fit to make any alterations; and (5) that being a penal statute it should be construed most carefully, and if in doubt, in favour of the appellant. For the respondents, it was argued that if a part of a meal could be sold on a Sunday, then Parliament could have said so in 1950. To hold that " meal or refreshment " (5th Schedule) includes " part of meal or refreshment " offends canons of constructions; the test must be, can this food stand alone as a meal?—sugar being neither a meal nor a refreshment.

Held, that it was permissible to sell on a Sunday anything which was capable of forming a meal or refreshment or part of a meal or part of refreshment; sugar was such a commodity, and it therefore fell within the 5th Schedule to the Shops Act, 1950, and no offence had been committed. [LIONEL SCOTT, *Barrister-at-Law.*]

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[7] For the appellant: *Donald Herrod* (instructed by Spencer & Fisch). For the respondent: *Gilbert Gray* (instructed by the Town Clerk, Leeds).

Commentary. Section 47 of the Shops Act, 1950, enacts that, except as provided in Part IV of that Act, every shop shall be closed for the serving of customers on Sunday. The proviso to the section however, permits the serving of customers on Sunday " for the purposes of any transaction mentioned in the Fifth Schedule to this Act." By section 48 of the Act, a local authority may make a " partial exemption order " authorising shops, subject to certain conditions, to remain open for the serving of customers for the purposes of the transactions mentioned in the Sixth Schedule to the Act.

One of the items referred to in the Fifth Schedule is " meals or refreshments whether or not for consumption at the shop at which they are sold." In *Binns* v. *Wardale* it was held that a loaf of bread was a refreshment within the corresponding provision of the Shops Act, 1936, and therefore, that it was not an offence to keep a shop open for the sale of bread on Sunday. Bread is specifically referred to in the Sixth Schedule (and the corresponding schedule of the 1936 Act) and no partial exemption order had been made in that case. If bread is a " refreshment " there is, of course, no point in including it in the Sixth Schedule, for its sale is permitted without the necessity for a partial exemption order. The court felt able to conclude that, nevertheless, bread was a refreshment because the Sixth Schedule permits the sale of the items there enumerated " in so far as such sales are not included amongst the transactions mentioned in the Fifth Schedule to this Act."

Though Lord Goddard C.J. did visualise the possibility of a loaf of bread being eaten alone as a meal (" on a railway journey or somewhere he can get no other food at all ") and it is less easy to imagine a pound of sugar being eaten by itself, it is thought that there is no really satisfactory ground for distinguishing between the two cases, for in the vast majority of cases both bread and sugar would form part only of a meal.

TRADE

False trade description—bulk or individual sample to comply

Downland Bedding Co. v. Retail-Trading Standards Association Inc.

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Ashworth JJ.: *The Times*, January 17, 1959.[8]

D. was convicted of applying a false trade description to goods and selling them, contrary to sections 2 (1) (*d*) and 2 (2) of the Merchandise Marks Act, 1887. The goods in question were certain pillows, to which D. had attached the " Kite Mark " symbol of the British Standards Institution. The pillows bore a label with the words " Made and guaranteed by D. Quality SLO. Filling: Crushed-Feathers. This article conforms to Kite Mark Standards which safeguard and ensure a specification of size, weight and quality." The standard of quality prescribed by the Institution for the filling of this type of pillow (" crushed-feathers ") is contained in standard No. 1877, which prescribes certain tests. If the filling is to conform with the standard, the tests must show that the filling contains less than 2 per cent. of " extracted matter." The tests were carried out on the pillows, and showed that the filling contained on average 3·7 per cent. of such matter.

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[8] For the appellants: *H. I. Nelson, Q.C.*, and *G. Wright* (instructed by Messrs. Lightbounds, Jones & Co. for Messrs. Bryan & Co., Liverpool). For the respondents: *T. Michael Eastham* (instructed by Messrs. McKenna & Co.).

D. appealed upon the grounds that the pillows had been manufactured in the prescribed manner, and when the prescribed tests were applied to the bulk from which the pillows were filled, they produced less than 2 per cent. of extracted matter.

Held, dismissing the appeal, that the sampling required by the British Standards Institution was not confined to the bulk of the filling from which the individual pillows were filled, but was applicable also to single pillows. Accordingly, the provisions of standard No. 1877 were satisfied only if the filling of each pillow contained less than 2 per cent. of extracted matter. [D. C.]

Commentary. One who contravenes the provisions of section 2 (1) is liable to conviction " unless he proves that he acted without intent to defraud." This defence has been very narrowly construed and is only available where the accused can show that he did the act by accident or mistake: *Kat* v. *Diment* [1951] 1 K.B. 34. A man has an intent to defraud for the purposes of this statute if he intentionally applies to an article a description which is in fact false, even though he does not know it to be false. The position is the same under section 2 (2). Thus a person who is perfectly innocent in every moral sense may have an intent to defraud for the purpose of the statute.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Imprisonment

In R. *v*. SMIDT the court (Lord Parker C.J., Donovan and Ashworth JJ.: January 12, 1959) reduced a sentence of five years' imprisonment to one of twelve months' imprisonment. S. had pleaded guilty at quarter sessions to burglary and storebreaking. S., who was a man of twenty-seven years of age, had eight previous convictions; he had been bound over four times and then sent to borstal, where he had absconded on six occasions. In May, 1951, he had been sentenced to eighteen months' imprisonment for housebreakings, and in January, 1953, to four years' imprisonment for burglary. He was released from prison in August or September, 1955. The present offence was committed when S., together with another man, broke into a post office store and then a public-house and stole chocolates, cigarettes and two quarter-bottles of brandy because, they said, they were hungry. The court stated that although S. had a bad record he had been out of trouble for some three years. It was to be observed that the other man had been sentenced to twelve months' imprisonment only. The court felt that the sentence of five years' imprisonment was out of proportion to the offence and savoured very much of his being convicted again for his past record. Accordingly, the sentence would be reduced to twelve months' imprisonment.

In R. *v*. PARK the court (Lord Parker C.J., Cassels and McNair JJ.: December 15, 1958) reduced a sentence of five years' imprisonment to one of three years' imprisonment. P. had pleaded guilty at quarter sessions to indecent assault on his son aged eleven years and his stepson aged twelve years. P., who was a man of thirty-eight years of age, had four convictions for minor dishonesty but none for indecency. The court stated that these offences were, of course, very serious ones, but there were certain matters which could be put in the scales on the other side. First and foremost, the offences had taken place some two years ago and it seemed reasonably plain that P. had controlled himself and had committed no further offences with those boys. Indeed, his wife had apparently learned of the matter at the time and had taken the boys to a doctor who had found no evidence of any visible interference. Moreover, at the trial P. had pleaded guilty, thus avoiding the necessity of the boys giving evidence. It seemed to the court that in these circumstances five years' imprisonment was a very severe sentence for these isolated offences committed some two years ago. The proper sentence was one of three years' imprisonment.

Preventive detention

In R. *v.* McCarthy the court (Lord Parker C.J., Cassels and McNair JJ.: December 8, 1958) reduced a sentence of eight years' preventive detention to one of three years' imprisonment. M. had been convicted by a magistrates' court of larceny and sentenced by quarter sessions. M., who was a man of thirty-four years of age, had eleven previous convictions. He had been bound over or fined on the first four and on the ninth occasion. He had been sentenced to four years' corrective training in 1950 for shopbreaking and arson; to twelve months' imprisonment in 1956 for larceny; fined nine months later for larceny; sentenced to twelve months' imprisonment in May, 1957, for larceny; and in May, 1958, was put on probation for twelve months for larceny. The present offence was stealing six pairs of trousers worth thirty-five shillings in all from outside a shop. The court stated the sentence clearly was not justified by reason of the actual offence committed; he was probably drunk at the time and when caught he told the police that he wanted to flog the trousers for a few pints. The truth was that this man was more in the nature of a sneak thief. Although M. clearly qualified on his record for preventive detention, the court thought that the sentence of preventive detention was not justified by that record in this case. He was a comparatively young man and had never had more than twelve months in prison. Accordingly, the court would substitute a sentence of three years' imprisonment with an order under section 22 for the sentence of eight years' preventive detention.

Probation

In R. *v.* Callaghan the court (Lord Parker C.J., Cassels and McNair JJ.: December 15, 1958) varied a sentence of six months' imprisonment to probation for two years. C. had been convicted at quarter sessions of attempted housebreaking. C. was twenty-three years of age and previously of good character. The offence was committed when C. climbed up into the attic of his house (which was a terraced house) and went along under the roof to one of the adjoining houses. He lifted a trap-door and, seeing somebody in the room below, went away without taking anything. The court stated that C. was said to have been a good worker, honest and sober and his wife, who seemed herself to be an excellent type of woman, spoke highly of him. Having regard to the fact that this seemed to be an absolutely isolated offence by a man of good character the court was prepared to substitute for the sentence of six months' imprisonment a probation order for two years.

Acts and Orders *

Agriculture

January 26, 1959, is fixed as the appointed day, in relation to England and Wales, for the coming into operation of all the provisions of the Agriculture Act, 1958 (6 & 7 Eliz. 2, c. 71) other than those which came into force on August 1, 1958, when the Act received the Royal Assent. AGRICULTURE ACT, 1958 (APPOINTED DAY) (ENGLAND AND WALES) ORDER, 1959. (S.I. No. 80) (2d.).

Armed Forces

The execution of sentences of death passed by courts-martial under the provisions of the Naval Discipline Act, 1957 (5 & 6 Eliz. 2, c. 53) are made subject to various regulations and provisions, and rules are prescribed for the production of persons sentenced to death before the Courts-Martial Appeal Court. The principal matters dealt with are as follows: prisons and other establishments and types of custody in which persons sentenced to death may be kept pending execution (Reg. 3); removal from and to the United Kingdom of persons sentenced to death (Reg. 5); the kinds of prisons and establishments where death sentences may be carried out (Reg. 6); committal or transfer to civil prisons in the United Kingdom (Reg. 7); code for the treatment of persons under sentence of death (Reg. 8); the duties of superintendents of colonial prisons in relation to persons sentenced to death under the Naval Discipline Act, 1957 (Reg. 9); nomination of a provost officer responsible for due execution of the death sentence (Reg. 10); issue of death warrants and safeguards to be observed before their issue (Reg. 11); methods of execution and arrangements to be made where an execution is carried out (Regs. 11, 13 and 14); method of

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* Prepared by F. Maurice Drake, *Barrister-at-Law*.

burial (Reg. 15); forms of committal to and removal from prisons and other establishments (First Schedule); forms of death warrant and certificate (Second Schedule). Operative January 17, 1959. EXECUTION OF SENTENCES OF DEATH (NAVY) REGULATIONS, 1959 (S.I. No. 62) (6d.).

Food

Provision is made for the staining and sterilising of all meat which is unfit for human consumption and all meat from knackers' yards. The sale by retail of any unfit meat is prohibited unless it has been sterilised, exceptions being made only for sales from slaughterhouses and knackers' yards to zoos, menageries and mink farms. "Meat" is defined in Regulation 2 (1) to include offal and fat but not bones, blood, wholemeat or a whole dead animal. The Regulations, which come into force on April 1, 1959, are to be enforced by local authorities and port health authorities. MEAT (STAINING AND STERILIZATION) REGULATIONS, 1959 (S.I. No. 20) (3d.).

For penalties for contraventions see Regulation 11 of these Regulations.

Milk: see SCOTLAND, p. 224, *post*.

London Traffic

The following Orders have been made detailing prescribed routes: S.I. 1958, No. 2276 (Kingston-upon-Thames) (3d.); S.I. 1959, Nos. 88 (Bethnal Green) (2d.); 89 (Ealing) (3d.).

Restrictions are placed on the driving of certain vehicles along a specified length of a footpath in Wembley. No person is permitted to drive or cause to be driven any vehicle other than a perambulator, handcart, invalid carriage or a bicycle or tricycle pushed by hand along the specified footpath. Operative January 26, 1959. LONDON TRAFFIC (WEMBLEY) (RESTRICTIONS ON DRIVING) REGULATIONS, 1959 (S.I. No. 90) (2d.).

For penalties for contraventions see Regulation 3 of the Regulations.

The principal Regulations (S.I. 1958, No. 1880) are amended so as to impose a speed limit of 40 m.p.h. on a greater length of the London–Portsmouth trunk road (Route A.3) in the Borough of Guildford. Operative January 26, 1959. LONDON TRAFFIC (40 M.P.H. SPEED LIMIT) (AMENDMENT) REGULATIONS, 1959. (S.I. No. 87) (3d.).

Matrimonial Causes

The Maintenance Orders Act, 1958 (6 & 7 Eliz. 2, c. 39) came into operation on February 16, 1959, and the procedure to be followed and the terms to be used in connection therewith are now prescribed. Part I relates to maintenance orders registered under the Act, Part II to attachment of earnings orders and Part III to miscellaneous and supplemental matters, including the new provisions as to committal to prison. For the general provisions of the Act which is now brought into force see [1958] Crim.L.R. 630. Operative February 16, 1959. MAGISTRATES' COURTS (MAINTENANCE ORDERS ACT, 1958) RULES, 1959. (S.I. No. 3) (9d.).

For penalties for contraventions see section 15 of the Act.

Merchandise Marks

Additional methods of indicating the origin of imported refractory bricks, blocks and tiles not made from molten materials are now permitted. Hitherto under the principal Order (S.R. & O. 1930, No. 527) the only permissible method of marking these goods was by impressing or embossing the indication of origin on each brick, block or tile; but it is now permissible to indicate the origin by painting or stencilling it on each brick, block or tile or on the container (if any) in which it is imported, sold or exposed for sale as the case may be. The provisions of an earlier amending Order (S.R. & O. 1937, No. 720) are incorporated and that Order is accordingly revoked. Operative December 20, 1958. MERCHANDISE MARKS (IMPORTED GOODS) NO. 4 ORDER, 1930, AMENDMENT ORDER, 1958 (S.I. 1958, No. 2183) (3d.).

For penalties for contravention see section 5 of the Merchandise Marks Act, 1926.

Merchant Shipping

The fees at present chargeable in relation to the issue or renewal of a load line certificate and the annual survey which a ship is required to undergo during the currency of her load line certificate are changed. The alterations are (i) an increase of about 33⅓ per cent. in the standard fees; (ii) the introduction of a new and lower scale of fees in respect of unclassed ships under 50 tons; (iii) an increase in the additional fees chargeable in respect of every partial annual survey and in cases where more than one visit is paid to the ship by the surveyor from £4 15s. to £6; and (iv) a provision that the additional fee where more than one visit is paid to the ship by the surveyor shall be chargeable in respect of ships over 300 tons instead of as at present only in respect of ships over 500 tons. The Load Line (Amendment) Rules, 1952 (S.I. No. 1958) are revoked. Operative January 12, 1959. LOAD LINE (AMENDMENT) (No. 2) RULES, 1958 (S.I. 1958, No. 2271) (3d.).

Pests

The Norfolk County Council and the Norwich and Great Yarmouth Corporations are empowered to appoint officers to examine within their respective areas willow trees, shrubs, stools and setts for the presence of watermark disease and to serve notices requiring the restriction of those infected and the taking of steps to prevent the spread of the disease. The Order is to be enforced by the County Council and Corporations. Operative January 15, 1959. WATERMARK DISEASE (NORFOLK) ORDER, 1959 (S.I. No. 40) (3d.).

For penalties for contraventions see Article 8 of the Order.

Scotland

Milk sold in Scotland for human consumption as Channel Islands, Jersey, Guernsey or South Devon milk is required to contain not less than 4 per cent. by weight of butter fat, and is further required to conform to the requirements of the Milk (Special Designations) (Scotland) Order, 1951 (S.I. 1951, No. 644), and be appropriately labelled. Operative January 2, 1959. MILK AND DAIRIES (CHANNEL ISLANDS AND SOUTH DEVON MILK) (SCOTLAND) REGULATIONS, 1958. (S.I. 1958, No. 2229) (3d.).

For penalties for contraventions see Regulation 7 of these Regulations.

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of readers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

54. *Fine imposed by Appeal Committee of Quarter Sessions*

Recently a convicted youth was committed to the Appeal Committee of Quarter Sessions for sentence under section 20 of the Criminal Justice Act, 1948, with a recommendation for borstal training. Instead a fine was imposed. Whose duty is it to enforce this fine—by means of the Estreat Roll of Quarter Sessions or by the Clerk to the Justices?

Similarly, what is the position when a person who has been fined by a magistrates' court appeals to quarter sessions and the fine is confirmed or varied? [C. P.]

ANSWER

By section 86 of the Magistrates' Courts Act, 1952, any adjudication of quarter sessions on an appeal from a magistrates' court may be enforced by the lower court "without prejudice to the powers of the court of quarter sessions to enforce the decision." The absence of any such provision in the law concerning borstal committals means that only quarter sessions can enforce the resulting adjudication, whatever its nature. Summary jurisdiction is a creature of statute and cannot be assumed to exist if it is not expressly stated. [A. E. J.]

Letters to The Editor

Sir,

In turning the leaves of the September, 1957, issue I found your "Case and Comment" on *Russell* v. *Smith* at pages 610 *et seq.* interesting.

At page 611 Lord Goddard's dicta—

> "If somebody leaves something in my house and I do not know that he has left it, it does not seem to me that it could be said that I am in possession of that property,"

in *Russell* v. *Smith*, was placed beside his illustration—

> "A, meaning to give his neighbour a present of game takes

> a brace of pheasants to the latter's house; finding the door open he leaves them in the hall, and thereby abandons both his property in and possession of them. B has at the moment gone out to post a letter, so does not know of A's gift. C, who has seen A's action, enters the house before B returns and steals the game. Can it be doubted that C is guilty of larceny and that the property can rightly be laid in B? "

in *Hibbert* v. *McKiernan* [1948] 2 K.B. 142, 150. However, both views seem reconcilable if it is realised that possession in these cases is being looked at from different angles. In *Hibbert* v. *McKiernan* it is from the aspect of *South Staffs. Water Co.* v. *Sharman*—namely, that one may be in possession without knowing of the existence of the thing possessed; while in *Russell* v. *Smith* one can only " take " possession if and when one becomes aware of the existence of the thing that is being taken.

Perhaps it would have been less painful to distinguish *Russell* v. *Smith* from *Moynes* v. *Coopper*, had the latter decision rested solely on the fact that there was no *invito domino*.

Yours truly,
J. S. Kerr,
Barrister-at-Law.

Montego Bay.

[Professor Smith writes: " Mr. Kerr's view seems to be much the same as that advanced in 1951 by Mr. P. B. Carter, " Taking and Acquisition of Possession in Larceny," in (1951) 14 M.L.R. 27. This view attempts to rationalise the cases by distinguishing between " taking," on the one hand, and the acquisition of possession on the other. Mr. Carter suggested that the acquisition of possession is a necessary constituent of " taking " but is not co-extensive with it. " There is a further mental element which is a separate and essential element of a larcenous taking—knowledge that you possess and knowledge of the major attributes of what you possess. Taking is completed when the accused has possession and has this knowledge."

This theory would justify decisions such as *R.* v. *Ashwell* (1885) 16 Q.B.D. 190 (as well, of course, as *Russell* v. *Smith*) by showing that the " taking " occurred subsequent to the acquisition of possession and coincided with the formation of the *animus furandi*. There are, however, serious difficulties in its application. If a thief steals from a pocket in the dark and is apprehended before he knows what he has got, it would be absurd to suggest that there had been no taking —yet the thief never knew the major attributes of the thing he possessed. Similarly, if a thief drove away a lorry intending to misappropriate the contents, it would be absurd to suggest that he did not take until he knew what those contents were. For this reason it is thought that the doctrine advanced is unsatisfactory.

The most satisfactory way of distinguishing *Moynes* v. *Coopper* and *Russell* v. *Smith*, in my view, is to say that in the former case the accused had become the owner of the money and therefore could not possibly steal it (the *ratio decidendi* of quarter sessions—see my article, " Larceny by Finding Out " [1956] Crim.L.R. 516); whereas in the latter case the accused certainly never became the owner of the sacks, but was a mere custodian and could, therefore, steal them from his employer in whose possession they were."]

Books and Periodicals

Book reviews:

Family Relationships and Delinquent Behaviour. By F. Ivan Nye, Director, Sociological Research Laboratory, State College of Washington. New York. 1958. 168 pp. (including index).

This book contains a sociological study based upon the statistical method. The object was to measure delinquent behaviour among young people in the non-institutionalised population. For this purpose a questionnaire was used in the high schools of three small cities after careful preparation with the authorities concerned. The indications of delinquent behaviour subject to this study may be derived from the questionnaire which is set out on pages 13 and 14 in Part One, Parts Two and Three of the book are essentially concerned with social control as exercised by the family. For this purpose Part Two analyses the family structure and Part Three parent-adolescent relationships and delinquent behaviour. The nature of the questionnaire relied on here is indicated in the respective chapters.

A book of this technical nature is of interest for two reasons: as a study in method and, secondly, on account of its findings. The method employed will not be comprehensible to anyone unfamiliar with statistical analyses and especially with the work of Louis Guttman.

The conclusions reached are tentative in that previous theories are for the most part supplemented and indications are given of specific areas requiring research.

The author obviously writes from a background of considerable knowledge and understanding of delinquent behaviour and for this reason alone his comments in the text are both interesting and stimulating. Chapter Three, which considers delinquency in relation to the economic status, is an example where the author, in conjunction with two colleagues, indicates that " there is no significant difference in delinquent behaviour of boys and girls in different socio-economic strata."

T. E. JAMES.

Clarke Hall and Morrison's Law Relating to Children and Young Persons. First Supplement to Fifth Edition. By A. C. L. Morrison and L. G. Banwell. Published by Butterworth & Co., Ltd. 1958.

Several new statutes have been passed since the fifth edition of this useful book was published in 1956. They are annotated in this Supplement.

The most important is the *Children Act, 1958.* This places squarely on local authorities the duty of ensuring the well-being of all foster children within their area. Furthermore, it is now necessary for each person who proposes to take a foster child into his care to give, except in an emergency, two weeks' notice to the local authority before he receives the child. This Act also brings a welcome amendment in the narrowly construed *section 2* of the *Adoption Act, 1950,* in that if the parent or guardian of the infant has persistently failed without reasonable cause to discharge the obligations of a parent, the court may dispense with their consent to the proposed adoption.

JEAN GRAHAM HALL.

Books received:

Archbold: Criminal Pleading, Evidence and Practice. 34th edition. By T. R. Fitzwalter Butler and Marston Garsia, Barristers-at-Law. London: Sweet & Maxwell, Ltd. 1959. cxcvi, 1620 and (index) 99 pp. £5 5s. net. Cumulative Supplemental Service, 12s. 6d. per annum: Noter-up Service, 8s. 6d. per annum.

Readers' digest:

Juvenile offenders: Juvenile courts: the juvenile's point of view: 9 *British Journal of Delinquency*, No. 3, 200.

Juvenile offenders: Prediction methods and young prisoners: 9 *British Journal of Delinquency*, No. 3, 192.

Prostitution: 9 *British Journal of Delinquency*, No. 3, 161–191.

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THE
CRIMINAL LAW
REVIEW

April 1959

The Thurso Inquiry

Misgivings must have been felt by many police officers of the old school at the announcement last month that the accusations of criminal assault made by John Waters against two members of the Caithness Constabulary were to be resolved, not by the familiar method of criminal prosecution, but by the totally unfamiliar method of inquiry by Tribunal—unfamiliar, that is, in the sphere of criminal offences.

Daily use by such officers of the ordinary method of criminal prosecution may not have involved any realisation of the differences between the accusatorial method followed in the criminal courts of this country, and the inquisitorial method followed in Tribunals of this kind, and in the criminal courts of many foreign countries. They may not appreciate, for instance, that the job of the criminal court is merely to determine whether an accused person did, or did not, commit the crime alleged, whereas the job of the Tribunal is to decide what took place—a very different matter. They may not understand the proven value of the cross-examination of witnesses by counsel on both sides. They may not realise that the criminal courts obey the rules of evidence as a matter of law, whereas a Tribunal does so only if it chooses. They may not see how easily a Tribunal can ruin a man without giving him any right of appeal whatever. But they will certainly feel uneasy at this extension of the use of such an abnormal expedient as the Tribunal to what is a simple matter of an accusation of crime, when the ordinary machinery works so well.

But uneasiness of this kind, healthy though it undoubtedly is, should not blind anyone to the very real difficulty in which the Government found itself. Whatever may be the verdict of the

Tribunal on the justice or otherwise of the prolonged campaign of publicity on behalf of John Waters, it is the job of the Government to govern ; and one of the basic tasks of government is to maintain public confidence in the administration of justice. It was not open to the Government to say, as they could and no doubt would have said in an English case, that the boy could seek a verdict in the criminal courts. For the criminal courts were not open to him, because of the system prevailing in Scots law by which the Procurator Fiscal (or the Lord Advocate) normally has the last word in deciding upon a prosecution.

To have done nothing in the face of the reiterated demand for action would, as the Prime Minister pointed out in the Commons debate on February 17, have been in the interests neither of the administration of justice in Scotland nor of the lives and careers of the police officers concerned. In the consciousness of what Mr. Macmillan called the weakness of the Government position, and in the teeth of the dilemma facing them, the Tribunal offered the only solution.

But was this dilemma inevitable? Investigation by a Tribunal may well be better than the one-sided prosecution, to use the Prime Minister's word, of the two police officers by TV and the press. But an ordinary prosecution by the aggrieved boy would have been better than either. But while Scots law stands as it apparently does, such a prosecution seems impossible. It is all very well to refrain, as the Government quite properly did, from putting any pressure on the officials charged with the duty of deciding upon a prosecution ; all engaged in the administration or execution of the criminal law, whether Director of Public Prosecutions or Chief Constable, greatly cherish this absolute immunity from political pressure of any kind, central or local. But surely a safety valve is needed, if a dilemma of this kind is not to recur. And in English law such a safety valve exists, in the general right of anybody to institute criminal proceedings, despite a decision by the police not to prosecute. While the courts are thus open to an aggrieved person, he has no right to remain aggrieved. [C. W.]

The members of the Tribunal are: Lord Sorn, a senior judge of the Court of Session ; Sir James Robertson, Rector of Aberdeen Grammar School ; and Mr. J. N. Dandie, President of the Law Society of Scotland.

Police

The control of provincial police forces and the training of future senior officers of police have recently attracted the attention of Parliament. These subjects are of sufficient importance to warrant more than a short editorial note and, therefore, an article will be found on p. 233 below.

Tape recording played in court

At Bristol Assizes recently a woman pleaded guilty to wounding her husband with intent to cause him grievous bodily harm by striking him with a hammer (see *The Times,* February 25, 1959). In order to establish who was the aggressor in the quarrel which led up to the attack, Slade J. admitted a tape-recording of the altercation. The fact that they both talked at once made it impossible to produce an adequate transcript, and in view of this the judge allowed the actual recording, which ran for twenty minutes, to be played in court. Apparently the husband, who was a radio engineer, had been repairing a recorder and it was owing to his leaving it running that the row was recorded. Nevertheless it was he who was shown by the recording to have been the aggressor, and because of this the wife was merely bound over for twelve months.

It is of interest to observe that it appears, from *The Times* report, that the learned judge would have preferred a transcript to the actual recording had one been available. Yet in a case such as this, the actual recording of a bitter quarrel is obviously of more use than a mere transcript. Indeed, Slade J. said that it was quite clear that the husband was shouting at the wife, provoking her, and that her voice was quiet and in an undertone compared to his—a state of affairs which would hardly have appeared from a mere written account of the altercation. [D. W. E.]

The Street Offences Bill

The controversy over clause 1 of the Street Offences Bill still rages in Standing Committee. On March 4, the Committee rejected by twenty-three votes to fifteen an amendment proposing that the words " any person " be substituted for " common prostitute." The Committee had been warned that the proposed amendment would widen the scope of the Bill to an alarming extent. Mr. David Renton said: " We feel the words ' common prostitute ' are a protection for respectable women and for women having casual affairs."

We feel that the Government were right to reject this amendment. But the Bill would be greatly improved if it included a definition of the words " common prostitute," which would assist the courts in interpreting this section when the Bill becomes law. Mr. Renton in his reply to the Standing Committee has indicated what that definition would be: He said that the courts had never had much difficulty in deciding whether or not a woman was a common prostitute. The word " common " had various meanings. It was intended by Parliament to indicate that the prostitute offered her services habitually to all and sundry and not just casually as the kept woman of one man. To those who chose to understand " common " in the sense of vulgar there was a duty to remind them that this was not a profession which any woman was obliged to join.

Mr. Renton was emphatic that a " common prostitute " could not be a man.

He went on to say that under the Bill it would be necessary to prove on each occasion a woman was brought to court not that she was a prostitute at some time in the past but that at the time she was seen soliciting she was carrying on the trade of a common prostitute. This did not mean that all her past life could be raked up against her.

Nineteenth Clarke Hall Lecture

The Nineteenth Clarke Hall Lecture will be given at 5 p.m. on Thursday, May 21, in the New Hall of Lincoln's Inn. The lecturer will be Baroness Wootton of Abinger, who will speak on " Contemporary Trends in Crime and Treatment."

Applications for invitations should be addressed to the Secretary, Clarke Hall Fellowship, Tavistock House South, Tavistock Square, London, W.C.1.

Judicial appointment

The Honourable Thomas Gabriel Roche, Q.C., has been appointed Recorder of the City of Worcester.

The Police in Parliament

By PETER ALLSOP, *Barrister-at-Law*

> "The Government has a primary duty to maintain 'The Queen's Peace,' and for that purpose to ensure that there are efficient and vigilant police forces to protect the public against attacks on their persons or property."

Thus wrote the Home Secretary in his recent statement of policy, published as a White Paper entitled "Penal Practice in a Changing Society." He further stated that the nation depends upon an efficient police force as being one of the three main instruments in its war against crime.[1]

Parliamentary Supervision

In the past few months Parliament has spent a considerable time debating matters raised in this White Paper, and we have had much on prostitutes, perverts and penal reform, but the aspect which has received the scantiest consideration has been that relating to the police. This is, perhaps, to the credit of the police, but a reading of the Debates in the House of Lords [2] and the House of Commons [3] produces the impression, first, that there is dissatisfaction with the organisation of the police but, secondly, that the machinery of government does not appear equipped adequately to answer criticisms and defend those parts of the institution which are obviously good.

Change for the sake of change is to be deplored, but recent events have led many people to ask whether some changes in administration might not be worth considering. Adequate consideration of this question is just what Parliament has failed to give.

The need for some fuller consideration of police matters was clearly stated by Lord Chesham in his reply for the Government in the House of Lords on December 8,[4] when he said:

> "[Problems of police administration] do not lack importance because they are not always easily understood by those

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[1] Cmnd. 645.
[2] H.L. Debates, Vol. 213, cols. 4 *et seq.*
[3] H.C. Debates, Vol. 600, cols. 755 *et seq.*
[4] Vol. 213, cols. 35, 36.

> with experience in public affairs. It is all the more useful that we should have a debate in order to make these matters clearer to the public and, perhaps, if I may venture to say so, even to some of your Lordships."

It is therefore a pity that little light was thrown upon these important matters by this debate or the subsequent one in the House of Commons.

At the present time it is not possible for there to be proper discussion in the House of Commons on matters concerning the provincial police forces. Whilst the Home Secretary is police authority for the Metropolitan Police, provincial police forces come under the control of the appropriate local authority. The reason always put forward for this state of affairs is the cardinal principle of British policing that local forces should be autonomous and removed from national control. This argument is sound and, even if it were not, will not be challenged at this date; but when the Home Office provides 50 per cent. of the money, approves the appointment of Chief Constables, lays down the conditions of service, etc., of police throughout the country, it is surely unsatisfactory that the only discussion devoted to local police authorities in the House of Commons takes place on a Friday afternoon in a more than half empty House, and under the procedure of Parliament at the present time it appears impossible to obtain proper Parliamentary consideration of these matters unless a Bill is presented. Despite half taxation there is not half representation.

It is suggested that there is an answer to this problem within the existing police organisation, and that it lies in an expansion of the Home Office Police Inspectorate and its responsibilities and the Home Secretary's responsibilities to Parliament, a matter which is considered further below.

Provincial Police Forces

In his motion before the House of Lords in December, Lord Winterton asked for the appointment of a committee to inquire whether the statutory control of certain local authorities over provincial police forces is being properly exercised. The recent cases in Brighton and Worcester, although isolated instances of dishonesty, were undoubtedly the cause for this part of Lord Winterton's motion. The difficulty reverted to time and again in this Debate and in the House of Commons was: Whose servants are the police? There was considerable discussion as to whether the Chief Constables are the servants of the local authorities or of the Crown, and it is perhaps worth noting in connection with this question, first, that policemen take an oath of loyalty to the Crown and, secondly, that the matter has been raised very recently in the courts. In the case of *Receiver for the Metropolitan Police District* v. *Croydon Corporation*[5] Lord Goddard C.J., in the Court of Appeal, followed two previous cases[6] and stated the principle that an action *per quod servitium amisit* would not lie because the police officer is not a servant of the police authority but of the Crown, for he may have to act independently of the police authority. This case does not appear to have been drawn to the attention of either of the Houses of Parliament.

The control of local police by a local authority is vital. What is more, in most cases it works and should not therefore be unnecessarily disturbed. But should a local watch committee or Chief Constable desire to quash an inquiry the matter can, at present, only be ventilated in the press, hardly a satisfactory solution.

In Debates, and elsewhere, there has been made a plea for more " democratic control." This presumably means control by the people; but, if so, control by what people? If it means the man in the street acting through his representatives in Parliament then clearly the powers of the House of Commons at present do not produce democratic control, mainly, it is said, because local police should not be at the mercy of the party in power. If this is an argument against national control, how much more is it an argument against control by watch committees where the local party in power has detailed control of local police forces. If unfettered local control is the answer, then surely the model should be the Standing Joint Committee, composed partially of councillors and partially of magistrates, as argued by Mr. John Hobson.[7]

Here again, it is submitted, the answer lies with the Inspectorate.

Home Office Police Inspection

The second part of the motion proposed by Lord Winterton raised the question whether powers of the Home Office Inspectorate of Constabulary need to be strengthened. In the subsequent debates in both Houses little satisfaction is to be gained from the official answers. There were two main points taken. First the responsibilities of the Inspectors and second the appointment of a Chief Inspector. To deal with the latter point first, it is clear that no strong evidence could be produced that the appointment of a Chief Inspector was necessary.

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[5] [1957] 2 Q.B. 154.

[6] *Att.-Gen. for New South Wales* v. *Perpetual Trustee Co. Ltd.* [1955] A.C. 457; *I. R. C.* v. *Hambrook* [1956] 2 Q.B. 641.

[7] Vol. 600, col. 762.

On the responsibilities of the Inspectorate most is to be gleaned from the Debate in the House of Lords, since the point was dismissed shortly by Mr. David Renton, Joint Under-Secretary of State for the Home Department.

The position was stated by Lord Chesham as follows:

> " Inspections are of a searching character, and the reports made to my right honourable friend [the Home Secretary] are most detailed. They show that it is unlikely that deficiencies in a police force would escape the vigilance of Her Majesty's inspectors."

This failed to satisfy noble Lords. Particularly since further on he says:

> " I admit that there is nothing peculiar to Brighton . . . but I believe it is unreasonable to suggest that Her Majesty's Inspector should have unearthed the particular corruption that was going on in Brighton, because, as I had said, it was not one of his responsibilities to do so."

What are then the responsibilities of the Police Inspectorate?

The primary function of the Inspectorate is to advise the Home Secretary whether the forces are efficiently maintained, so that they can qualify for the Exchequer grant in aid of the police authority's expenditure. The Inspectors offer advice on improvements, on establishments and other like matters, and because of their position *vis-à-vis* the forces their advice is readily sought and accepted.[8]

The main bone of contention between Lord Chesham, speaking for the Home Office, and the noble Lords speaking for Lord Winterton's motion was whether a force which is corrupt can be efficient, and whether Inspectors should discover such corruption. On this Lord Chesham himself said:

> " One cannot expect Her Majesty's Inspector to know of all these kinds of occurrences that are going on in every spot in his whole area. He needs to know them, I agree, but he cannot be expected to know them all himself unless they come to his attention by one means or another. Certainly, if any major complaint of failure of law enforcement which went to the root of the efficiency of one of the forces he was supposed to inspect came to his notice he would naturally take it into

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[8] Vol. 213, col. 42.

> account. But he really cannot be expected to set himself up as a sort of private-detective force."

What then is the solution? Lord Winterton[9] suggests that we need a number of area bodies having no executive responsibilities and being independent of executive action, to receive and investigate complaints. It seems that this would be yet another body of overlords, and it is one which should not be welcomed. Surely the answer lies in improving the system which already exists.

There is in existence a body of Inspectors, respected by the police themselves, experienced in police matters and answerable to the Home Office. There are, however, only five men and one woman inspector for England and Wales, and their responsibilities are limited. It is suggested that the number of Inspectors be increased at least to eight, that their responsibility should cover the receipt of complaints, and that they should be responsible to Parliament where the Home Secretary would answer for their reports on general or specific matters.

In any event the Inspectors should be provided with office staff on a scale consistent with their many duties.

The advantage of this would be that there would be a recognised channel through which the public may receive reasonable satisfaction, and there would also be the additional advantage that the police administration could be improved where necessary. It would help to remedy the present situation where any person can make an ill-considered (and perhaps ill-natured) criticism of the police in general without anyone being charged with the responsibility for answering such criticism. It could make clear the position of the Inspectors who can only " advise " or " recommend." It would also enable them to standardise many procedures.

Police Training

Police administration is bound to suffer if the quality of police leadership is not sufficiently high. This is a matter which has caused some concern. Before the war, the answer provided was the creation of the Metropolitan Police College at Hendon: it has now been categorically stated by Mr. David Renton that there is no question of reviving that experiment. After the war, a White Paper was presented to Parliament on higher training for the police service in England and Wales.[10] Following on this White Paper a Police College was established on a national basis, open equally to all the police forces in England and Wales.[11] Recognising that the ordinary course of a policeman's career does not in itself fit him for service in higher or even intermediate ranks, some training of men (a) for the duties of inspector, and (b) for duties in ranks above inspector was commenced. In addition, training for senior officers in short courses is also given. This training has now been given for over ten years and it is, therefore, surprising to read:

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[9] See also *Public Law* [1959] pp. 3, 4.

[10] 1947 Cmd. 7070.

[11] The Scottish Police College at Tulliallan was founded about a year later.

> "But [the police college] is still unable to provide instruction for men who might be suitable for promotion either to inspector, or subsequently, to Chief Constable."

This allegation was made by Mr. John Hobson [12] when considering the number of staff at and cost of the college. It is possible that what Mr. Hobson meant to say was that the college has not the capacity to accommodate all the police officers who should go there but that is not the meaning which is immediately apparent. What is astounding, however, is that this statement was neither challenged nor explained by the Under-Secretary of State.

During the past six years fifteen former members of the directing staff of the Police College have been appointed as Chief Constables or Assistant Chief Constables, or the equivalent metropolitan ranks, quite apart from other senior appointments. It cannot be said with justice that a college with this kind of directing staff is unable to provide instruction for men suitable for promotion.

Further, even if the Police Training College appears to have fallen short of the highest requirements of some Chief Constables, surely time could have been found in the Debate in the House of Commons for some reference to the changes in syllabus and approach that have recently been inaugurated by the Police College and which were announced as far back as October of last year.

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[12] Vol. 600, col. 762.

The Concept of Crime: An American View*

By GRAHAM HUGHES, M.A., LL.B.
Senior Fellow, Yale Law School

Our equipment for pursuing, trapping and dissecting legal concepts is these days being much improved. The methods of the new philosophical analysis are receiving juristic recognition and we are learning the futility of the search for atomistic referents for legal concepts. As Wittgenstein was fond of saying, the concern with such an inquiry is a sort of mental cramp. It is explicable only by " the fascination which forms of expression exert upon us."

Instead, we are now told that the meaning of a word is its use in a characteristic expression. Philosophy is nowadays therapeutic; analysis must reject the posing of questions of high generality and insist on the examination of concepts as they are put to work in examples taken from actual discourse. And if the concept is one of a specialised language, then the therapy will consist of putting the concept back to work in its own specialised setting.

Professor H. L. A. Hart has attracted a good deal of attention by applying this method to the concepts of " right " and " corporate personality."[1] A similar attempt with the concept of crime has not, in the United States at any rate, met with so much publicity. This is to be found in the essay, " The Definition of Crime," published in 1955 by Dr. Glanville Williams.[2] In this essay Dr. Williams attacks the stubborn attempt of Sir Carleton Allen and Professor Jerome Hall to ground the concept of crime in the notion of moral wrong or public damage. Both these features, Dr. Williams suggests, are expressive of common aspects of the law of crimes, but they are criteria which quite fail to split off penal law from the civil law of tortious remedies. So they cannot be acceptable as statements of the legal meaning of crime.

This leads Dr. Williams to the following statement:

> " We have rejected all definitions purporting to distinguish between crimes and other wrongs by reference to the sort of

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* This article is an extended and adapted version of a public lecture delivered at the Yale Law School in April, 1958.

[1] Hart, " Definition and Theory in Jurisprudence," (1954) 70 L.Q.R. 37.

[2] 8 *Current Legal Problems* (1955), p. 107.

> thing that is done or the sort of physical, economic or social consequences that follow from it. Only one possibility now remains. A crime must be defined by reference to the legal consequences of the act. . . . A crime then becomes an act that is capable of being followed by criminal proceedings, having one of the types of outcome (punishment, etc.) known to follow those proceedings." [3]

And later,

> "In short a crime is an act capable of being followed by criminal proceedings having a criminal outcome, and a proceeding or its outcome is criminal if it has certain characteristics which mark it as criminal. In a marginal case the court may have to balance one feature, which may suggest that the proceeding is criminal, against another feature which may suggest the contrary." [4]

Now Dr. Williams' essay has received little notice in the United States. The comments that are made on it seem to reveal a sense of irritation at what is felt to be the sterility of the approach, at its inadequacy for the settlement of besetting problems. The feeling seems to be that this is just what one might expect from a British analytical jurist—an arid definitional exercise of no conceivable utility for the judge, the practitioner or anyone concerned with the life of the law. To one interested in analytical jurisprudence this reaction is disturbing, for Dr. Williams' analysis seems to be impeccable and unimpeachable.

The English position

One reason for the lack of enthusiasm with which Dr. Williams' views have been received in the United States is the very different natures of the practical issues surrounding the concept of crime in the United States and England respectively. And it will be best to begin by considering in what way the question "What is a crime?" can be a practical question for the English lawyer. There are in England no entrenched constitutional clauses governing the nature of the procedure to be followed in a criminal prosecution. But this, of course, does not mean that there is not a very set and definite procedural pattern for the trial of criminal cases. It is quite possible for a defendant to allege that he is being denied a procedural protection peculiar to the criminal law, but this protection must be pointed to in a statute, rule of the court or at common law. If there is no dispute as to the criminal nature of the proceeding, then the only inquiry can be into the mandatory nature of the alleged protection and into whether it was in fact denied.

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[3] *Ibid.*, p. 123.
[4] *Ibid.*, p. 130.

But what of the question which plagues American courts—the question whether the process is properly to be regarded as a criminal one or not? Can this question not arise in England? The lack of constitutional guarantees would not seem to exclude such a question theoretically. But in practice it is a question that scarcely ever does arise. The reason for this seems to be that the penumbral proceedings which cause so much difficulty for American courts, such as juvenile delinquency or bastardy hearings, are in England tightly governed in a procedural sense by statutes and rules of court. And given this tight and precise description of the applicable procedure, there are, of course, no more questions to be raised in the English jurisdiction. For no possibility of appeal to an ultimate constitutional prescription exists. If Parliament provides that juvenile delinquents are not to be tried before juries, or that in bastardy proceedings the defendant is a compellable witness, that is the end of the matter. In the United States it is, of course, only the beginning.

The point is that though it may be argued in England that the proper procedure was not applied, this can rarely be because there is a doubt as to what the proper procedure might be.

Litigation in this field seems, indeed, to be only rarely encountered in the English reports. The matter came up in connection with the game laws in *Cattell* v. *Ireson*[5] where the defendant was charged under the Game Act, 1831, s. 23, with using an engine to take game without the proper certificate. He wished to give evidence on his own behalf, which at that time was generally impossible in criminal proceedings. The court looked to the language of the statute which spoke of a "conviction," an "offence," a "fine" and "imprisonment" in default of payment. The whole tenor of the enactment, the court felt, was in the nature of an imposition of punishment. The Lord Chief Justice said:

> "I do not proceed on the ground that section 23 uses the word 'offence' but on the ground that it treats the act as an offence."[6]

Again, in the late nineteenth century there was some hesitation about the nature of bastardy proceedings. In *R.* v. *Flavell*[7] the defendant in bastardy proceedings had tendered himself as a witness and was sworn and gave evidence contradicting that of the applicant. He declined to answer questions in cross-examination and stated that he withdrew his defence and consented to the order being made against him. It was held that he could nevertheless be committed to prison for contempt. There is no general discussion in the judgments of the nature of bastardy proceedings but the court seems to have tacitly assumed that they are predominantly civil in nature. In the course of his judgment A. L. Smith J. said:

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[5] (1858) El.Bl. & El. 91.
[6] El.Bl. & El. 98.
[7] (1884) 14 Q.B.D. 364.

> "The defendant may be required as a witness by the complainant and in that case he can be compelled to appear by summons or warrant . . . just as any other witness may be compelled to appear." [8]

Bastardy proceedings are still a field of interesting demonstration of a hybrid process. They are generally assumed to be predominantly civil in nature, but an appeal lies to quarter sessions [9] or, by way of case stated, to the Divisional Court.[10] In the United States there is great divergence amongst the jurisdictions on the treatment of bastardy hearings.[11] In most States the nature of the proceedings is predominantly criminal, including such features as arrest under a warrant, preliminary hearing in a lower court, detention under bond or commitment to prison on failure to give bond, and trial by jury. But civil rules of evidence are commonly applied.[12] New York curiously holds that though bastardy proceedings are civil, criminal rules of evidence apply, and Michigan has recently held that a motion for mistrial in bastardy proceedings must be granted because the attorney for the complainant commented in his argument to the jury on the failure of the defendant to testify.[13] A strong dissent by Smith J. in this case contains an interesting review of the topic.[14]

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[8] At p. 367. On the nature of bastardy proceedings in English law, see also *R.* v. *Lightfoot* (1856) 25 L.J.M.C. 115, 118, 119; *Cattell* v. *Ireson* (1858) El.Bl. & El. 91, 98; *O'Donnell* v. *Hegarty* [1941] Ir.R. 538; Patton, *The Law Relating to Affiliation Orders in Northern Ireland* (1925), p. 2.

[9] Magistrates' Courts Act, 1952, s. 83 (4). And an appeal lies from a refusal to make an order.

[10] Magistrates' Courts Act, 1952, s. 87.

[11] See Schatkin, *Disputed Paternity Proceedings* (1947), p. 46. In Pennsylvania and Massachusetts begetting a child out of wedlock is a crime.

[12] See *U.S. Department of Labor, Children's Bureau, Chart No. 16: Paternity Laws (1938)*, p. 12. For the procedure in civil law countries, see Aubert, *Les Actions de la Filiation en Droit Civil Suisse*, p. 119, from which it appears that the inquisitorial features of the criminal trial are to some extent imported into the affiliation proceedings.

But the field in which the most interesting litigation has occurred in England on the nature of the criminal process has been under the Judicature Acts, which, in setting up a Court of Appeal for civil cases, provided that no appeal shall lie to this court in "any criminal cause or matter."[15] It may be instructive to remind ourselves of a leading case on this point as an instance of the nature of the problem before the English courts and the method of their attack on it. This is the case of *Amand* v. *Home Secretary*, in 1943.[16]

The appellant was a Netherlands citizen who had been brought before the English magistrates as a deserter from the Netherlands army in England. There was a procedure established by the statute and order in council by which such persons might be handed over by the magistrates to the Netherlands military authorities. An application on behalf of the appellant for a writ of habeas corpus was refused by the Divisional Court, and an appeal to the Court of Appeal failed on the ground that this was a criminal cause or matter and the court accordingly had no jurisdiction. A further appeal to the House of Lords was rejected on the same ground.

The Lords confessed that the distinction between a habeas corpus proceeding in a civil matter as compared with one in a criminal matter was not easy to draw. The criterion of a criminal matter, they felt, was that the process should put the defendant in jeopardy of punishment inflicted by a court having jurisdiction. In the *Amand* case the process before the magistrates entailed the possible surrender of the defendant to a military court of the Netherlands services before which he might be charged and punished. It was therefore a criminal cause.

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[13] *People* v. *Stoeckl*, 78 N.W. 2d 640; 347 Mich. 1, (1956). The argument of the majority, delivered by Kelly J. was that, since bastardy proceedings had been held to be criminal in the sense that the defendant might waive jury trial, and in the aspects of bail and warrant for arrest, they must also be governed by the rules of criminal evidence with respect to appropriate and inappropriate comments for the jury.

[14] Smith J. recognised that bastardy hearings have some features of the criminal trial and are often referred to as being "quasi-criminal." But he looked for "the essential nature of the action" and found this to be in the protection of the public from a charge. In his sensible judgment he remarked: "The statute clearly is not criminal. It merely confers a right to support which did not exist at the common law. The fact that some indicia of criminal prosecutions are present means only that certain controls of the criminal process are here peculiarly appropriate" 78 N.W. 2d at p. 648.

[15] Now Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1).

[16] [1943] A.C. 147.

The United States

It will be noticed that the nature of the question in the *Amand* case did not raise at all the allegation that the process to which the defendant was subjected was improper. Its propriety was admitted on all sides, and the only question was whether an appellate jurisdiction was available. This is undeniably a question of policy, but it does not raise the immediately dramatic policy implications which the American courts have to resolve when considering the concept of crime.

For when a court in the United States has to decide whether a process is criminal or not, it is usually because of an allegation that some person has been denied the protection guaranteed by constitutional provisions. There may be an argument that the Sixth Amendment to the Constitution of the United States has been violated, or that the Fifth Amendment has been violated or that Section I of the Fourteenth Amendment has been infringed. The Sixth Amendment expressly refers to the position of the accused " in all criminal prosecutions " ; the Fifth Amendment refers first to " a capital or otherwise infamous crime," then to " any criminal case " and later to deprivation of " life, liberty or property without due process of law," and Section I of the Fourteenth Amendment, applying to the State Governments (Amendments 1 to 10 being confined to the Federal arm) refers only to the deprivation of " life, liberty or property without due process of law."

So a complaint by X may be that he has been subjected to a criminal prosecution within the meaning of the Sixth Amendment and in the absence of the protections that the Amendment affords, or it may be argued that it is a criminal case or an infamous crime under the Fifth Amendment, or again it may take the form of an allegation of deprivation without due process of law under the Fifth or Fourteenth Amendments. Or it may be a similar allegation under a State Constitution. The court may thus have to consider the question in the direct form " Was this a criminal process?" or, alternatively, it may conduct a very similar inquiry in terms of deprivation of due process. But always the real issue is the same—has X been proceeded against in a way which required his protection by the application of constitutional rules?

In their efforts to apply this complex of constitutional guarantees to the novel processes of the last half century, the American courts have struggled manfully. If the decisions are not always attractive, this is partly because of the inherent difficulty of applying an inapposite concept to novel situations. The petrifying of a concept of crime in a constitutional guarantee has not always proved the best way of saving the citizen harmless from oppression. Some of the decisions in fact lend weight to Napoleon's dictum that a constitution should have two virtues—it should be short and obscure. But the contrast with the English inquiry is surely clear enough. The English court has to decide the correct appellate jurisdiction for an admittedly valid trial process. The court in the United States has to decide whether or not to condemn a trial process, or, indeed, a non-judicial process as an invalid one. In both countries the inquiry is conducted in the framework of the concept of crime, but it is obvious that the same considerations and pressures are not operative.

We may now turn to the criteria which seem to have influenced courts in the United States in the pursuit of this inquiry. A good starting point is the case of *Wong Wing* v. *United States*,[17] where the Supreme Court of the United States was concerned with an Act of Congress of 1892,[18] which laid down a procedure for the arrest and subsequent deportation of Chinese labourers who had neglected to obtain a certificate of residence. Such persons might be arrested and taken before a United States judge "whose duty it shall be to order that he be deported from the United States as hereinbefore provided." [19] Section 4 of the Act provided that

> "any such Chinese person . . . convicted and adjudged to be not lawfully entitled to be or remain in the United States, shall be imprisoned at hard labour for a period not exceeding one year and thereafter removed from the United States."

The appellants had been brought before a commissioner of a circuit court of the United States. The commissioner ordered that they be imprisoned for sixty days at hard labour and thereafter deported.

The Supreme Court held that proceedings for the deportation of an alien could not generally be regarded as criminal. They relied on the language of Justice Gray in an earlier case:

> "The order of deportation is not a punishment for crime. It is not a banishment in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment." [20]

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[17] 163 U.S. 228, 16 S.Ct. 977 (1896). This and many of the cases which follow in the discussion are collected in Dession, *Criminal Law, Administration and Public Order* (1948).

[18] Act of May 5, 1892, c. 60, 27 Stat. 25.

[19] s. 6.

[20] *Fong Yue Ting* v. *U. S.*, 149 U.S. 698, 730; 13 S.Ct. 1016, 1028 (1893). This notion was generalised by Brandeis J. in his well-known judgment in

The court held further that

> "detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid,"[21]

but that the order for detention at hard labour for sixty days went quite beyond the scope of detention necessary to effect the deportation and passed into the realms of punishment. They said:

> "But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial."[22]

So banishment will be punishment for a citizen but not for an alien; confinement of a temporary nature in order to effect the deportation will not be punishment, but imprisonment at hard labour for sixty days is punishment. These adjudications reveal that the nature of the constraint or deprivation is not always a sufficient test in itself. We must also consider the status of the complainant and the aim or purpose with which the constraint is imposed. Punishment is one of the chief notions here but punishment is a slippery notion; its core is small and its penumbra large. And this is emphasised by the warm judicial disputes which have occurred in the juvenile delinquency cases which follow.

Juvenile court cases

In *People* v. *Lewis*[23] the appellant had been convicted by a county children's court of being a delinquent child and had been committed to the State Industrial and Agricultural School. The proceedings had been under the Children's Court Act, 1930, of the State of New York. Appellant objected to the committal on the ground that the finding of delinquency was based on a charge of theft and that during the hearing the children's court had received evidence in the absence of the appellant and had admitted evidence from the appellant without warning him against self-incrimination. The appellant's contentions had been accepted by the Appellate

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Helvering v. *Mitchell*, 303 U.S. 391, 399; 58 S.Ct. 630, 633 (1937): "Remedial sanctions may be of varying types. One which is characteristically free of the punitive, criminal element is revocation of a privilege voluntarily granted." He adds in a footnote: "Typical of this class of sanctions is the deportation of aliens. . . . Disbarment is likewise a sanction of this type."

[21] 149 U.S. at p. 235.

[22] At p. 237.

[23] 183 N.E. 353, 260 N.Y. 171 (1932).

Division which had reversed the order of the children's court. The Court of Appeals, by a majority, reversed the Appellate Division and restored the order of the children's court.

The Court of Appeals was swayed by the language of the statute which clearly sought to take children's court procedures outside the ambit of the criminal law. The statute ran:

> "No adjudication under the provisions of this act shall operate as a disqualification of any child subsequently to hold public office or as a forfeiture of any right or privilege or to receive any licence granted by public authority; and no child shall be denominated a criminal by reason of such adjudication, nor shall such adjudication be denominated a conviction. Neither the fact that a child has been before the children's court for hearing, nor any confession, admission or statement made by him to the court or to any officer thereof while he is under the age of sixteen years, shall ever be admissible as evidence against him or his interests in any other court." [24]

Relying on this statutory language the court said:

> "[I]t was not a criminal trial and there was no defect." [25]

And later:

> "The concept of crime and punishment disappears." [26] "The state was not seeking to punish a malefactor. It was seeking to salvage a boy who was in danger of becoming one." [27]

But a very different view was taken by Judge Crane dissenting.

> "May a child," he asked, "be incarcerated and deprived of his liberty in a public institution by calling that which is a crime by some other name?" "Do the Constitution of the United States and the Constitution of the state of New York apply to children or only to adults?" [28]

Crane J. took the view that the proceedings had violated the Constitution of the state of New York by which no person shall be compelled in a criminal case to be a witness against himself.

The dangerous potential of the *Lewis* case is brought out by the later decision of *Re Holmes*.[29] This case dealt with the procedure in the juvenile court of Pennsylvania. The Pennsylvania Juvenile Court Act, like the New York Act, provided that:

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[24] c. 393, Laws of 1930, s. 45.

[25] 183 N.E. at p. 354.

[26] *Ibid.*

[27] At p. 355.

[28] At p. 356.

[29] 109 A. 2d 523, 379 Pa. 599 (1954).

> "No order made by any juvenile court shall operate to impose any of the civil disabilities ordinarily imposed by the criminal laws of the Commonwealth, nor shall any child be deemed to be a criminal by reason of any such order or be deemed to have been convicted of crime."[30]

Here the appellant was a seventeen year old boy who, with a past record of delinquency, had been brought before a juvenile court on a delinquency petition alleging larceny in a church while armed. He was committed to the Pennsylvania Industrial School. On appeal he complained that hearsay evidence was wrongly admitted against him and that he had been compelled to give evidence against himself. A man who had been convicted of the robbery had confessed to it and in his confession had implicated the appellant. This confession, which was later withdrawn by the man who made it, was reported to the juvenile court by a detective.

The majority of the Supreme Court of Pennsylvania was not much impressed by these departures from the normal pattern of a criminal trial. "[Appellant's] claims," they said:

> "entirely overlook, in our opinion, the basis concept of a juvenile court. The proceedings in such a court are not in the nature of a criminal trial but constitute merely a civil inquiry or action looking to the treatment, reformation and rehabilitation of the minor child. Their purpose is not penal but protective. . . ."[31] "No suggestion or taint of criminality attaches to any finding of delinquency by a juvenile court."[32]

The proceedings, therefore, in the majority view did not violate Article 1, Section 9 of the Pennsylvania Constitution which provides that

> "In all criminal prosecutions the accused . . . cannot be compelled to give evidence against himself."

A passionate dissent was entered by Justice Musmanno. In perhaps rather rococo language he sketched his view of a juvenile court committal.

> "The grim truth is that a juvenile court record is a lengthening chain that its riveted possessor will drag after him through childhood, youthhood, adulthood and middle age. Even when the ill-starred child becomes an old man the record will be there to haunt, plague and torment him. It will be an ominous shadow following his tottering steps, it will stand by his bed

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[30] II Pennsylvania Statutes, 250, s. 19.

[31] 109 A. 2d at p. 525.

[32] *Ibid.*

> at night and it will hover over him when he dozes fitfully in the dusk of his remaining day." [33]

The case raises the vital question of the importance to be attached to legislative labels. It would seem clear that in a system which enshrines constitutional protections for the citizen the legislature cannot vitiate these guarantees by the arbitrary adoption of an unusual terminology. But the legislative terminology is, of course, to some extent evidential of and influential upon the social reality of the proceedings. The nature of the inquiry in the *Holmes* case, being into facts which amounted to armed robbery, would seem to partake of the nature of a criminal inquiry. Again the committal of the youth involves confinement. Is this punishment? Justice Musmanno observed that " it certainly does not come under the classification of pleasure." [34] True, it is reformative in aim, but so, one hopes, are the more conventional sanctions applied to adult offenders. To admit a reformative element does not exclude the modern concept of punishment.

There is clearly a need to take a juvenile away from the atmosphere of the criminal courts with their oppressive formality and where contact with adult criminals may not be easy to avoid. Again tending in the same direction is the overwhelming impulse in the case of the youth to get at the truth about his conduct so that the danger to his future may be detected and perhaps avoided. But balancing these is the recollection of the stigma involved in the finding of delinquency and the element of confinement in the committal. It is the paradox of much modern juvenile court procedure that, starting with an unalloyed desire to protect the child, the process has increasingly abandoned the conventional safeguards for doing justice.[35] It is submitted that in the *Holmes* case the majority was unduly impressed with the form of the legislative language and too lightly ignored the elements of social disgrace and confinement. It would not seem unduly difficult to devise a juvenile court procedure which would expel the features of a criminal trial which might be frightening or oppressive to the juvenile and yet preserve the protection afforded by the constitution on a charge of crime. The real difficulty here would be jury trial which nobody wants in the juvenile court. This reveals the limitations of the rigid channels in which the constitutional provisions confine the supervisory powers of the appellate courts.

[*To be continued*]

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[33] At p. 529.

[34] At p. 530.

[35] See Tappan, *Juvenile Delinquency* (1949), p. 169 and Nunberg, " Problems in the Structure of the Juvenile Court," 48 *Journal of Criminal Law, Criminology and Police Science*, 500, 503 (1958).

Prosecuting Officer

By Christopher Williams

Newman's First Case

" First case—bring in Henry James," called the Clerk, looking up from the charge sheet at Inspector Newman.

Henry James appeared in the dock, a slick-looking, fair-haired youth of nineteen. He brushed imaginary dust from the lapel of his neat, dark suit, and settled into a relaxed " at-ease " position. Bit of a sea-lawyer, thought Newman, certainly not the usual type of Saturday night trouble-maker ; very confusing, if the " Teds " start dressing like bank clerks.

" Have you an application in this case, Inspector? " asked the Clerk, after a pause during which the Clerk and Newman each seemed to be waiting for the other to do something. Sergeant Green, the officer in another case, who had been having a whispered consultation with Newman, wondered whether the Inspector had heard. Then he realised that the Inspector was not yet used to the Clerk's habit of never calling a spade a spade.

" He's asking you to make application for summary trial, sir," he hissed in a penetrating whisper. " Otherwise it'll have to go for trial."

Of course, thought Newman, section eighteen, Magistrates' Courts Act, 1952 ; fancy forgetting that—to say nothing of *James* v. *Bowkett*[1] into the bargain. " I ask for summary trial, your Worships," he said, in what he hoped sounded a confident and knowledgeable manner.

" Very well," said the Clerk. Then followed the usual interrogatory, establishing the identity between the smooth-looking youth now before the court and the trouble-maker of last Saturday night. James gracefully acknowledged that he was nineteen years of age, and was a plumber's assistant.

" You are charged," went on the Clerk, " with being in possession of an offensive weapon, that is to say, a length of metal chain, without lawful authority or reasonable excuse, in a public place, that is to say, the Follies Snack Bar in the High Street, Smallport, in the county of Loamshire, at ten o'clock in the evening of Saturday last, the tenth of July, contrary to section one of the Prevention of Crimes Act, 1953. Do you plead guilty or not guilty? "

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[1] *James* v. *Bowkett* [1952] 2 All E.R. 320.

" Not guilty, sir," replied James. The Clerk raised his eyebrows in invitation to the Inspector to proceed.

No point in my holding forth now, or addressing the court in any way, reflected Newman; perfectly straightforward case, only two witnesses, and they cover the whole story. P.C. Allen first, to tell how he'd been called in, and to give the details of the offence charged, and then the proprietor to tell what had led up to the entrance of the P.C.

" P.C. Allen," he said, motioning him into the witness-box. " Mr. Castro, please wait outside until you're called." A small swarthy man who had been standing near Allen pushed his way out of the courtroom, and the door swung to behind him.

P.C. Allen stepped into the witness-box, and took the oath like the veteran he was.

" At about ten p.m. on Saturday last, the tenth of July, I was on duty in the High Street, Smallport, and in consequence of what the driver of a passing bus told me I went to the Follies Snack Bar in the High Street. When I got there, the doors were open, and the prisoner was standing near the bar, arguing with Mr. Castro, who is the proprietor. Castro seemed to be ordering the prisoner out. There was no one else in the bar at the time. As I entered, Mr. Castro said, 'I want this boy put out, officer. He's been making trouble for my other customers.' I said 'What other customers?' and Castro said, 'Three other chaps were in having coffee and sandwiches and minding their own business. He started making himself a nuisance, so I told him to clear out.' Mr. Castro went on to describe what had happened between the prisoner and the other three men, and I then said to James, 'You've heard what he said, what have you got to say about it?' James said nothing, and tried to shoulder his way past me. As he pushed past I saw that his right-hand trouser pocket was a bit bulky, so I stopped him in the doorway and felt the side of his trousers. Then I put my hand in his pocket and pulled out this length of chain."

Here Allen held up a two-foot length of chain of the kind found in bathrooms. At one end there was a flat metal plug about two inches and a half in diameter and half an inch thick. He leaned forward and put it on the table in front of the Clerk, who passed it up to the Chairman.

" Go on," said the Chairman.

" I then said to James, 'What have you got this for?' and he replied, 'Look, I've been told to get out, why don't you get out of my way?' I then told him I was not satisfied that he ought to have the chain in his possession, and that I was going to arrest him. He tried to grab the chain, and I then took him to the police station, where he was charged and cautioned. He said, 'You'll be sorry you interfered with me.' He was searched, but nothing was found on him except nine shillings in silver. That is my evidence."

Inspector Newman thought for a moment. James might, he reflected, seek the sympathy of the court by saying that he was provoked; Castro would say otherwise, but it would leave it open. Better at least make it clear why the other customers weren't in court.

"Did you trace the other men referred to by Castro?" he asked.

"No, sir," replied Allen. "I never noticed them as I was going towards the snack bar, and Mr. Castro's description was very vague. Inquiries were made later that night, and since, but they haven't been traced."

Newman could think of nothing else that needed clearing up, so he sat down. The Clerk had got to his feet, and was muttering something to the Chairman. Sergeant Green leaned towards the Inspector and said, *sotto voce,* "First time they've had one of these in this court. I fancy they're bothered about the snack bar being a public place. Would have saved trouble if Allen had waited till James was outside; still, the section's clear enough."

Pity I didn't think of that too, thought Newman; I might have treated them to a bit of law at the beginning. He noticed James trying to hear what the Clerk was saying. "All right," he whispered to Green, "I'll bring it out of Allen now."

But he was too late. The Clerk and the Chairman had finished their consultation, and the Clerk said, "James, is there anything you want to ask this witness?"

James seemed to have been waiting for this. "Yes," he said, "Where was I when you took this chain off me?"

"Just inside the snack bar." James nodded in a satisfied manner.

"You said just now that when you got me to the station you cautioned me. Did you caution me before, when I was trying to get out of the snack bar?"

"Yes, I did," replied Allen. James nodded, a slight smirk on his face.

Inspector Newman stood up. Bit of luck him asking that about being in the snack bar, he thought; means I can ask Allen a bit more about that. Hope he knows his section. "Allen," he said, "Did it make any difference to your actions, James still being inside the snack bar when you found the chain?"

"No," replied Allen. "He was still in a public place."

"How do you mean," asked Newman.

"Well," replied Allen, "the section says a public place includes any premises or place to which the public have, or are permitted to have, access, whether on payment or otherwise."

"Thank you," said Newman, as he resumed his seat. They can't object to that, he reflected; surely Allen's entitled to explain his legal grounds for arresting anyone. He looked up, and caught the ghost of a smile from the Clerk. "Mr. Castro," he called.

The swarthy man appeared at the door in a moment or two, and followed the Inspector's gesture into the witness-box. After the preliminaries, which merely disclosed that the witness was forty years old, was a Cypriot, and was the owner of the Follies Snack Bar. Mr. Castro described the entry of the prisoner into the snack bar, and what happened then. "As soon as he came in, he acted like he wanted to be noticed by these other chaps. I knew him, but I'd never seen these other chaps before. I didn't notice much about them, except they were dressed a bit fancy like. They were all about seventeen or eighteen. As soon as he came in he started passing remarks, quiet like, I couldn't hear just what he said, but I think it was about the other three, their clothes or something. Anyway, they didn't seem to like it much, and they told him to 'belt up.' He went to rush at them, shouting out he'd settle their business for them, so I came round the bar and got between them, and told them all to get out. The others went quick enough, but this chap stayed on, and started arguing the toss with me, saying he wanted service." After describing the arrival of Allen, Castro said, "So I shut up shop and followed them to the police station, where I made a statement. That's all."

Inspector Newman thought for a moment, signalling to Castro to stay where he was. First, he reflected, he must clinch the business about the snack bar being a public place. Then, perhaps, touch up the point about the other three customers; James might start something about Castro picking on him because he was on his own, though the others had provoked him. Nothing to do with the charge, really, but you never know.

"What time do you usually shut your café on Saturday evenings, Mr. Castro?" he asked.

"Eleven o'clock. It would have been eleven o'clock last Saturday, if it hadn't been for the bit of trouble."

"And when you are open for business, who may come into your café?"

"Anyone at all," replied Castro. "They come in for a snack, or they come in to meet their friends. I don't bother them so long as they're quiet; they buy something sooner or later."

" You were still open, then, when the prisoner came in? " Was that a leading question? Newman asked himself; might have been safer and therefore better to say simply " Were you open . . .? "

" Yes, I've just told you," replied Castro.

" Now, about those other customers. You have told the court you did not recognise them. Were you able to give the police a description of them? And can you say who started passing remarks—James or the others? "

" Yes—I mean no," replied Castro. " I mean no, I couldn't give the police a description, because I didn't notice them, except to see that they were about the same age as this chap, and dressed a bit fancy like. But I can definitely say that it was this chap who started taking liberties, the others took no notice of him till he started that."

That'll teach me to put only one question at a time, thought Newman, as he sat down.

" Any questions? " the Clerk said to James.

" I told you I wanted service," said James to Castro. " Why didn't you give it me? "

" Because you make trouble, and I want no trouble in my place," replied Castro.

" Don't you expect trouble when people ask for service and don't get it? "

" I don't serve people who make trouble," repeated Castro doggedly.

" All right," said James. " I'm supposed to have had an offensive weapon, just because I had a bit of chain from work on me. Did you see me try to use the chain when the trouble started? "

" No, because I never gave you a chance," replied Castro.

Good for you, thought Newman. James shrugged his shoulders, and said he had no more questions. Newman pondered whether to show how long James had been in the snack bar before ordering anything, but decided against doing so, because it had no direct bearing on James having the chain on him.

" Thank you, step down, please," he said. " That is the case, your Worships."

The Clerk looked at James, and said, " James you now have the chance of saying anything you want. You can either say it from where you are, in which case you do not take the oath, and cannot be asked questions. Or you can make it in the witness-box, in which case you must be sworn, and can be asked questions. Or, if you choose, you can do neither. What do you want to do? "

(You could've told him he can do both, if he likes—say the tricky part from the dock, and the true part from the witness-box, thought Newman.)

"I'll go in the witness-box," said James, stepping briskly out of the dock. Now, I suppose we'll get a lawful authority or reasonable excuse, thought Newman. James took the oath.

"I went to the Follies for a coffee after the pictures. As soon as I'd got inside, these three chaps started taking the 'micky,' jerking their heads and grinning about me, taking liberties. I stood it a bit, then I told them to pack it in, and the guv'nor there came round and told us all to clear out. He picked on me because I was on my own, and there was three of them, I could see that. I'd come in for coffee, and I told the guv'nor I was going to stay till I'd got some. Then the policeman came in, and started roughing me about. He pulled this chain out of my pocket. I was quite entitled to have this chain. I work for a plumber, and I often carry bits and pieces like that around with me. I pick 'em up wherever I'm working, when I pack up for the day, so as not to leave them lying around, and turn 'em in next time I'm in the yard. Another thing, I'm supposed to have been in a public place, well, if that snack bar's a public place, what call has the guv'nor got to turn me out? I mean, they can't have it both ways. That's all."

The Clerk smiled faintly, and looked at Newman.

Well, now, thought Newman, the things this chap thinks of; what am I supposed to do now? Could human ingenuity have foreseen this? Ah, well, he'll have to rebut it himself, by cross-examination.

"How were you dressed when you went into the snack bar?" asked the Inspector.

"Like I am now," replied James.

"When did you pick up the chain?"

The smirk left James' face. "Friday night, when I knocked off," he muttered.

"How were you dressed on Friday night, when you stopped work?"

"Dungarees."

"When and how did the chain get from your dungarees into the suit you're wearing now?"

The prisoner was silent, and shrugged his shoulders. So much, thought Newman, for lawful authority or reasonable excuse. Still better make quite sure.

"Why didn't you tell the police officers why you had the chain?" he asked.

" Because they told me I needn't say anything, and what I did say would be evidence," snapped James.

Newman sat down abruptly. Teach me to leave well alone, he thought ruefully.

" All right, James, go back," said the Clerk. Everyone stood up as their Worships filed out at the back of the courtroom. Newman glanced at the clock. Hope they hurry up, he thought; the Superintendent wanted to see me before lunch. And he began to review in his mind what he had learned.

[*To be continued*]

Eric Burgin

' Oh ! for heavens sake, Lester, beginning to go bald isn't the end of the world !"

Offences under Sections 11 and 12 of the Road Traffic Act, 1930

By Keith C. Clarke,

Prosecuting Solicitor, Southampton Corporation

1. Was the defendant driving the vehicle?

As each year passes, more motor-vehicles appear on our roads and it is not surprising when we hear that road traffic accidents are on the increase. Consequently, today a great deal of time is spent by magistrates in adjudicating upon cases brought by the police under sections 11 and 12 of the Road Traffic Act, 1930, and advocates are called upon daily to prosecute and to defend in such cases.

The purpose of this article, and those which are to follow, is to examine some of the most important matters with which anybody who prosecutes or defends these cases ought to be familiar. The reader will not find herein an exhaustive survey of all the existing case law relating to these offences, but an endeavour has been made to stress certain matters which are of practical importance.

The prosecution must prove these elements in any proceedings under section 11 or 12, *viz.*:

(1) That the defendant was driving a motor-vehicle;
(2) That he was driving it on a road; and
(3) That he was driving it carelessly or dangerously, etc., depending upon the offence charged.

In this article, we shall be concerned with the matter of the prosecution proving that the defendant was driving the motor-vehicle in question, *i.e.*, the first of the above-mentioned elements, and accordingly it will be convenient to consider the following questions:

Although the defendant was in the vehicle at the time, can he be said to have been driving it?

Often a defendant who has been involved in a motor accident cannot remember anything about the collision or about his actions immediately before that time, and in such a case his loss of memory may be due either to something which happened to him prior to the accident or to the injuries which he sustained at the time of the accident. If the defendant's inability to remember what happened can be shown to be due to something which occurred prior to the accident, then he may have a possible defence to a summons under section 11 or 12 on the ground that he was not consciously driving the vehicle at the relevant time. In the event of such a defence being contemplated, the following points should be noted:

(i) If a person falls asleep at the driving wheel and his vehicle subsequently becomes involved in a traffic incident, it will be no defence to a summons under section 11 or 12 for him to plead that, since he was asleep, he was not driving the vehicle at the time.

In *Kay* v. *Butterworth* [1] the defendant, who was overcome by sleep or drowsiness, drove his car, in daylight, into a party of soldiers who were marching on the road in a column in the same direction as that in which he was driving. The magistrates found the defendant not guilty of offences under sections 11 and 12, and upon a case being stated by the prosecutor the Divisional Court directed the magistrates to find that both of the offences were proved. The reason which the court gave for its decision was that a driver is under a duty to stop his vehicle as soon as he feels the onset of drowsiness and should not continue to drive until he has shaken it off and is wide awake again. This decision was followed in *Henderson* v. *Jones* [2] where the Divisional Court held that a person who fell asleep drove her vehicle on to the wrong side of the road and collided with an oncoming vehicle, had no defence to a summons for driving without due care and attention. Further, in *Hill* v. *Baxter*,[3] Lord Goddard C.J. made the following observation *obiter*: "That drivers do fall asleep is a not uncommon cause of serious road accidents and it would be impossible as well as disastrous to hold that falling asleep at the wheel was any defence to a charge of dangerous driving. If a driver finds that he is getting sleepy he must stop."

Finally, it might be mentioned that the unreported case of *Edwards* v. *Clarke* [4] does not conflict in any way with the decision in *Kay* v. *Butterworth*. In *Edwards* v. *Clarke*, the evidence produced by the police was to the effect that the defendant was seen walking along the road and his car was found at the side of the road with its bonnet in the hedge. The defendant admitted that the car was his and when asked to account for it being in the hedge he said, "I fell asleep." The Divisional Court held that, in these circumstances, the magistrates had properly dismissed a summons against the defendant under section 12, *not because it was a defence in such a case to say, "I was asleep," but because there was no*

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[1] (1945) 110 J.P. 75.

[2] (1955) 119 J.P. 304.

[3] [1958] 1 Q.B. 277.

[4] [1950] 115 J.P.N. 426.

evidence as to the manner in which the car was driven by the defendant (as explained by Lord Goddard C.J. in *Henderson* v. *Jones*).

(ii) In *Hill* v. *Baxter*, the defendant drove his vehicle across a road junction completely disregarding a halt sign and colliding with another vehicle which was travelling on the major road. The defendant said that he was unable to remember anything that happened after a point some little distance before the scene of the accident, and the magistrates found him not guilty of dangerous driving, accepting the contention that his loss of memory must have been due to some sudden onset of illness which had resulted in him continuing to drive automatically. On appeal, the Divisional Court remitted the case to the magistrates with a direction to convict, since *there was, in fact, no evidence to justify a finding that the driver was not fully responsible in law for his actions.* The court was, therefore, primarily concerned with the question of whether, on the evidence before them, the magistrates were justified in dismissing the summons on the ground that the defendant was not consciously driving at the time of the accident. However, a number of important questions were considered by the court and in particular the reader's attention is drawn to the following matters:

(a) If, by some extraordinary mischance in the nature of an Act of God, a driver is suddenly rendered unconscious or otherwise incapacitated from controlling his vehicle, then, if he subsequently becomes involved in a traffic incident and is summoned under section 11 or 12 in respect thereof, it may properly be said that he was not driving the vehicle at the time. In such a case, the driver may be said to be in a state of "automatism," *i.e.*, performing acts in a state of unconsciousness, and he will not be liable at criminal law in respect of those acts.

(b) Pearson J. gave the following examples of cases where it could be said that at the material time the defendant was not driving the vehicle:

"(1) The man in the driving seat is having an epileptic fit, so that he is unconscious and there are merely spasmodic movements of his arms and legs. (2) By the onset of some disease, he has been reduced to a state of coma and is completely unconscious. (3) He is stunned by a blow on the head from a stone which passing traffic has thrown up from the roadway. (4) He is attacked by a swarm of bees so that he is for the time being disabled and prevented from exercising any directional control over the vehicle, and any movements of his arms and legs are solely caused by the action of the bees."

After observing that falling asleep did not come within the defence of automatism, Pearson J. went on to point out that a person who suffered an epileptic fit would not necessarily be entitled to an acquittal. If such a person had suffered from these fits in the past, then, depending upon their degree and frequency, it could be said that, since he drove his car with knowledge of the risk of the onset of such an attack, he should be liable at criminal law.

(c) Lord Goddard C.J. pointed out that the onus of proving automatism lies upon the defence in such a case, although the burden of proof is less than that which rests upon the prosecution. Devlin and Pearson JJ. agreed that the defence had to produce at least prima facie evidence of automatism, but reserved the question of where the burden of proof ultimately lies. The magistrates had decided that there was a defence of automatism without there being any prima facie evidence to support such a finding. The only evidence called before the magistrates on behalf of the defence was that of the defendant himself, who stated that he could not remember anything about the accident. Since the prosecution did not object, two letters from a doctor who had recently examined the defendant, and which did not assist in establishing a defence of automatism, were put before the bench. These letters should never have been put in, since agreed medical reports have no place in criminal proceedings where, normally, evidence must be given on oath and be subject to cross-examination.[5]

In *Wallace* v. *Major* [6] it was held that a person who was at the driving wheel of a broken-down motor-lorry, which was being towed by a second vehicle, was not a "driver," since he had nothing to do with the propulsion of the vehicle and could not, therefore, be found guilty of an offence under section 11. By virtue of section 121 (1) of the Road Traffic Act, 1930, "driver," where a separate person acts as steersman of a motor-vehicle, includes that person as well as any other person engaged in the driving of the vehicle, and the expression "drive" shall be construed accordingly. This definition did not assist the prosecution in *Wallace* v. *Major,* because it is apparent from the wording that a steersman can only be said to be a driver by virtue of section 121 (1) if the other person concerned is engaged in driving *the same vehicle*, *e.g.*, where two persons are operating a steam wagon.

There are many decisions upon the question of whether a person can, in certain given circumstances, be said to be the driver of a vehicle for the purposes of numerous offences under the Road Traffic Acts. Whilst we are concerned here with offences under sections 11 and 12, some of those decisions are worth consulting if there is any doubt as to whether a person charged with an offence under section 11 or 12 can properly be said to have been driving the vehicle at the time, *e.g.*, *Saycell* v. *Bool*,[7] where the defendant was charged with driving whilst disqualified, contrary to section 7 (4) of the Road Traffic Act, 1930. He pushed his van down an incline, got into the driving seat and steered for about one hundred yards. He was held to be a " driver " and was convicted, even though there was no petrol in the tank. In *R.* v. *Kitson* [8] the defendant was charged with driving whilst under the influence of drink, etc., contrary to section 15 of the Road Traffic Act, 1930. He was a passenger and woke up to find the driver gone and the car moving, so he steered it for about three hundred yards, finishing up on a grass verge. He was held to be a " driver " and was convicted. In *Langman* v. *Valentine* [9] a learner was sitting in the driver's seat and had used the accelerator, and a supervisor was sitting in the front passenger seat with one hand on the brake and another on the steering wheel. It was held that both could be said to be " drivers " of the car. The learner was convicted of driving without a licence, contrary to section 4 (1) of the Road Traffic Act, 1930. In *Evans* v. *Walkden* [10] a learner was driving the car and a supervisor was sitting in the front passenger seat and not holding the steering wheel or any of the car's controls. It was held that the supervisor was not a " driver " because he was not, in fact, in control of the car. Since the learner was unlicensed and the supervisor, although licensed, was held not to be a driver at the time, the latter, who owned the car, was not indemnified against third party claims under the terms of his policy of insurance, which provided that the underwriters should not be liable for any loss, etc., arising whilst the car was being driven by an " unlicensed driver." The learner was, therefore, convicted of using the car without an insurance under section 35 of the 1930 Act and the supervisor was convicted of permitting the learner to use the car without an insurance.[11]

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[5] The effects of "petit mal" and diabetes are discussed in 114 J.P.N. 16 and 119 J.P.N. 133 respectively. For a case where the driver had an attack of pneumonia prior to the accident and the magistrates consequently dismissed a summons for driving without due care and attention, see *Police* v. *Beaumont* [1958] Crim.L.R. 620.

[6] [1946] 2 All E.R. 87; 110 J.P. 231.

Can the defendant be identified as the driver of the vehicle in question?

Failure on the part of the prosecutor to adduce evidence to the effect that the defendant was the driver of the vehicle alleged to have been driven carelessly or dangerously, etc., will result in the case being dismissed.[12] It is, therefore, a matter of the first importance that the defendant be identified as the driver of the vehicle in question, and the magistrates *may* properly refuse to allow the prosecution to re-open their case where they have failed to give evidence as to identity.[13]

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[7] [1948] 2 All E.R. 83; 112 J.P. 341.

[8] (1955) 39 Cr.App.R. 66.

[9] [1952] 2 All E.R. 803; 116 J.P. 576.

[10] [1956] 3 All E.R. 64; 120 J.P. 495.

[11] See also 120 J.P.N. 327 and (1956) Journ.Crim.Law 5.

[*To be continued.*]

Monroe v. *Twistleton Today*

By RUPERT CROSS, D.C.L.

In *Monroe* v. *Twistleton* [1] the plaintiff claimed payment for the board and lodging of the defendant's child. He called a Mrs. Sandon to prove the contract on which his action was founded. At the time when the contract was alleged to have been made, Mrs. Sandon was married to the defendant. She had since been divorced by Act of Parliament and had remarried. Lord Alvanley held that, as she was the defendant's former wife, Mrs. Sandon was an incompetent witness to prove a contract or anything else which happened during her first marriage, although she could have testified to any fact arising after the divorce. That was in 1802. Mrs. Sandon would almost certainly be held to be a competent and compellable witness for the plaintiff or defendant under the present law, and it may well be asked why this defunct civil case should be the subject of even the briefest note in a criminal law review. The answer is that Lord Alvanley considered that his decision would apply to the evidence of the accused's divorced wife at a criminal trial and, as recently as 1954, we were reminded that *Monroe* v. *Twistleton* still governs a number of criminal cases.

R. v. Algar

The reminder was provided by *R.* v. *Algar*.[2] The accused went through a ceremony of marriage with Mrs. Algar in 1934. It was alleged that he forged her signature on a number of cheques in 1947 and 1948. In 1950 Mrs. Algar obtained a decree of nullity on the ground of the respondent's impotence. She subsequently gave evidence for the prosecution at Mr. Algar's trial for forgery. He was convicted and his appeal turned on the question whether Mrs. Algar was a competent witness for the prosecution. This problem had to be determined by the common law, for Mrs. Algar's bank was the ultimate victim of the alleged forgeries. There was therefore no question of the applicability of statutes relating to proceedings under the Married Women's Property Acts. At the hearing of the appeal counsel for the Crown conceded that Mrs. Algar would have been an incompetent witness for the prosecution if the marriage had been terminated by divorce. The only issue was whether the retrospective form of the nullity decree made any difference. The Court of Criminal Appeal held that it made no difference because the marriage was voidable and not void *ab initio*. For the purposes of the law of evidence, Mrs. Algar was as much the wife of Mr. Algar at the time of the alleged crime as Mrs. Sandon was the wife of Mr. Twistleton at the time of the making of the contract which was in issue in *Monroe* v. *Twistleton*. Mr. Algar's appeal was accordingly allowed.

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[12] *Jones* v. *Carter* [1956] Crim.L.R. 275.

[13] *Middleton* v. *Rowlett* [1954] 2 All E.R. 277; 118 J.P. 362.

[1] (1802) Peak Ad.Cas. 219.

[2] [1954] 1 Q.B. 279.

The necessity of counsel's concession

The concession that *Monroe* v. *Twistleton* still applies to criminal proceedings came as a surprise to some lawyers because the point was not stressed in the current textbooks, but a moment's reflection shows that the concession was one that had to be made. At common law the spouses of the parties to a civil suit were incompetent witnesses in that suit and, as a general rule, the accused's spouse was an incompetent witness in a criminal case.[3] Let it be granted that this incompetence extended to a divorced spouse so far as matters occurring during the marriage were concerned, and the evidence of such a spouse with regard to these matters can only be received if he or she is rendered a competent witness by statute. No statute renders the accused's spouse competent to give evidence for the prosecution in a case of forgery in which a bank is the defrauded party. Mrs. Algar would therefore have been an incompetent witness for the Crown if her marriage had been dissolved after the alleged forgeries. Lord Goddard C.J. said that *Monro* v. *Twistleton* had been approved again and again, and there would probably have been no point in arguing that the case was open to review by the Court of Criminal Appeal.[4]

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[3] The exceptions concerned charges of personal violence by one spouse against another and possibly treason.

[4] An appeal to the House of Lords appears to have been contemplated but the fiat was not granted.

Statutory provisions

Since *Monroe* v. *Twistleton* was decided, the spouse of a party to civil proceedings has been made a competent and compellable witness in all cases, and the accused's spouse has been made a competent witness for the defence in criminal cases. The accused's spouse is also a competent witness for the prosecution on a strictly limited number of charges. It is worth while considering some of the statutes by which these changes have been effected with special reference to the competence of a divorced spouse to testify to matters occurring during his or her marriage.

Civil cases

The principal statutory provision concerning the competence of a party's spouse as a witness in civil proceedings is section 1 of the Evidence Amendment Act, 1853, the relevant parts of which read as follows: " On the trial of any issue joined, . . . the husbands and wives of the parties thereto, . . . shall, except as hereinafter excepted,[5] be competent and compellable to give evidence . . ." While there can be no doubt about the aptness of the above words to make A.'s present wife a competent and compellable witness for either party to an action for breach of contract brought by A. against B., it may well be asked how A.'s divorced wife can possibly be held to be the " wife " of a party to the issue. Such a construction is essential if section 1 of the Act of 1853 is to be held to have abrogated the effect of the decision in *Monroe* v. *Twistleton* on an action for breach of contract. There is no other relevant statutory provision and, at first sight, the construction placed by the courts on section 3 of the Evidence Amendment Act, 1853, does not support the view that, in section 1, divorced wives are to be numbered among the " wives of the parties."

Section 3 reads as follows: " No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage."

Shenton v. Tyler

In *Shenton* v. *Tyler*[6] the Court of Appeal held that this section did not enable a widow to refuse to answer interrogatories concerning a secret trust alleged to have been communicated to her by her deceased husband during their marriage. The case is an important one on account of the sharp distinction drawn by the court between the rules governing the competence of a witness and the privilege of a competent witness to refuse to answer certain questions. Section 3 confers a privilege on a competent witness. After stressing the fact that, in terms, it only relates to husbands and wives, the Master of the Rolls said that no known principle of construction entitled him to read into the section a reference to " widowers or widows or divorced persons." The case may thus be cited as authority for the proposition that, if A is suing B for breach of contract, A's divorced wife can be obliged to disclose communications made to her by A during their marriage, but this assumes that she is a competent witness.

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[5] The exceptions related to criminal cases and proceedings instituted in consequence of adultery.

[6] [1939] Ch. 620.

The judgments in *Shenton* v. *Tyler* do not give any direct guidance with regard to the competence of the divorced wife of a party in civil proceedings. At first sight it might seem that the construction of the words " husband " and " wife " in section 3 so as to exclude divorced persons means that they ought not to be included among the " husbands and wives of the parties " mentioned in section 1, but there are some words at the end of Sir Wilfrid Greene's judgment which support the contrary view. One of the reasons why he felt unable to extend section 3 to cover divorced persons was the fact that no analogy was provided by *Monroe* v. *Twistleton* because that decision concerned competency and not privilege. This suggests that Sir Wilfrid Greene would have been prepared to construe the words " husbands and wives " in section 1 (which is solely concerned with competence and compellability as opposed to privilege) so as to include divorced persons. There is thus a vestige of authority in favour of what is surely the commonly accepted view that *Monroe* v. *Twistleton* no longer applies to a civil case. The remarkable thing is that the authority is so very tenuous.

Criminal cases

If Bill Sykes is on trial for stealing from John Doe, Bill's wife Alice Sykes cannot give evidence for the prosecution because the case is governed by the common law.[7] Would it make any difference if the alleged theft took place before Bill's marriage to Alice? The commissioners who reported on common law procedure in the middle of the last century would certainly have said that Alice was an incompetent witness, notwithstanding the fact that the crime alleged against her husband took place before she married him, and nothing that has occurred since the middle of the last century could lead a contemporary lawyer to give a different answer. In their second report, published in 1853, the commissioners said " the law of England in civil cases (as also in criminal with some few exceptions) precludes a husband or wife from giving testimony in a cause in which the other is a party; and the rule is carried so far as to prevent their being examined, either as to circumstances which happened before the marriage, or even as to the marriage itself." [8] An argument in favour of the competence of the accused's wife to testify concerning matters occurring before her marriage could be based on an analogy with *Monroe* v. *Twistleton*. It could be said that, just as Mrs. Sandon's incompetence was limited to the period of her marriage to the defendant, Alice Sykes's incompetence should be similarly restricted. Such a conclusion would, however, be contrary to the policy of the common law concerning the incompetence of the accused's spouse which is usually said to be based on the danger of disrupting the marriage. This danger would hardly be lessened by the fact that the crime charged took place before marriage. The decision in *Monroe* v. *Twistleton* is anomalous because it applied the common law of competency to a case in which the marriage had already been dissolved.

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[7] *R.* v. *Boucher* (1952) 36 Cr.App.R. 152.

The accused's two wives

What if Bill had been married to Charlotte at the time of the alleged theft? If Charlotte had divorced him and he had then married Alice, would both Alice and Charlotte be incompetent witnesses for the prosecution? The answer seems to be that this is one of the rare occasions on which a man benefits from the possession of two wives.

The Criminal Evidence Act, 1898

The Criminal Evidence Act, 1898, provides that the " wife or husband " of the person charged shall be a competent witness for the defence but, as a general rule, only on the application of the person charged. At common law, competence implies compellability,[9] but this is not the case under the Criminal Evidence Act, 1898. Section 4 (1) of that Act provides that the wife or husband of a person charged with an offence under any enactment mentioned in the schedule may be called as a witness for the prosecution without the consent of the person charged. The House of Lords has held that, though this provision renders the accused's wife a competent witness for the prosecution in the specified instances, she is not compellable.[10] It never seems to have been doubted that the principle of this decision governs the construction of section 1.

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[8] p. 12. The statement is supported by authority.

[9] *R.* v. *Lapworth* [1931] 1 K.B. 117.

[10] *Leach* v. *R.* [1912] A.C. 305.

So far as our hypothetical trial of Bill Sykes for stealing from John Doe is concerned, Bill's present wife Alice would be competent but not compellable to testify on his behalf if he wanted her to do so. She could also claim to be privileged from disclosing any communication made to her by Bill during the marriage because section 1 (*d*) of the Criminal Evidence Act, 1898, contains a provision which is identical in terms with section 3 of the Evidence Amendment Act, 1853, to which reference has already been made.

What of Bill's divorced wife Charlotte? Is she also " the wife of the person charged " so far as her competence to testify to matters occurring during her marriage to Bill is concerned? It is submitted that she would be so treated by the courts. At common law a wife was incompetent to testify for her husband in every case in which she was incompetent to testify against him.[11] Unless Bill can point to a statute under which Charlotte may give evidence for him, she would have to be held incompetent to do so on the authority of *Monroe* v. *Twistleton*. The only statutory provision to which Bill can point is section 1 of the Criminal Evidence Act, 1898, which speaks of " the wife of the person charged." The Criminal Evidence Act is not as great a blessing to Bill as it might have been. At best Charlotte is only competent to testify on his behalf and he might well want her to be compellable. Assuming that section 1 (*d*) of the Act of 1898 is to receive the same restrictive interpretation as that placed on section 3 of the Evidence Amendment Act, 1853, in *Shenton* v. *Tyler,* Charlotte could be obliged to disclose communications made to her by Bill during the marriage.

Conclusions

There are other statutes relating to the law of evidence in which the words " husband " and " wife " are used without any indication whether they include a divorced spouse testifying to matters occurring during his or her marriage.[12] No useful purpose would be served by a detailed discussion of their terms because enough has been said already to show that the possible application of the decision in *Monroe* v. *Twistleton* renders the law uncertain. It may also have the effect of rendering the law unsatisfactory for, although there is something to be said for making a present husband or wife incompetent to testify against his or her spouse, in most criminal cases it is very difficult to justify the extension of that incompetency to a divorced spouse. The privilege against disclosing matrimonial communications is another matter. In *Monroe* v. *Twistleton* Lord Alvanley used words which some may consider as true today as they were when they were spoken. " Miserable indeed would the condition of a husband be if, when a woman is divorced from him, perhaps for her own misconduct, all the occurrences of his life, entrusted to her while the most perfect and unbounded confidence existed between them, should be divulged in a court of justice." Developments since *Monroe* v. *Twistleton* was decided, notably the terms of section 3 of the Evidence Amendment Act, 1853, and section 1 (*d*) of the Criminal Evidence Act, 1898, together with the judgments in *Shenton* v. *Tyler,* show that the husband of today is in the condition contemplated by Lord Alvanley. The modern husband can do nothing to stop his present wife from disclosing confidential communications in a court of justice, because the privilege against doing so is that of the spouse to whom the communication was made. A divorced wife can even be compelled to make the disclosure, because the privilege does not extend to divorced persons.

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[11] *R.* v. *Sergeant* (1826) Ry. and Moo. 352 at p. 354.

[12] *e.g.*, Married Women's Property Act, 1884, and Matrimonial Causes Act, 1950, s. 32 (1) and s. 32 (2).

Assuming that we can't have a complete code of evidence, is it too much to hope that we may have a Husbands and Wives (Evidence) Act in which the law concerning the competence of spouses to testify for and against each other is put on a rational basis?

Proposals to Expedite Criminal Trials: Some Comments

Dr. Glanville Williams' article, " Proposals to Expedite Criminal Trials," which we published in our February issue, has called forth much comment.

The Times, in a leading article on February 2, expressed agreement with Dr. Williams' proposals that the present inquiry before examining justices should not be held unless it is demanded by the prosecution or the defence. The article continues: " The old system would then be used only in so far as experience justified its real value. That sensible proposal should clearly be implemented, but there are details to be worked out: provision must be made to ensure, for instance, that the accused should have adequate opportunity to apply for legal aid and consider the statements of Crown witnesses (subject to additional evidence being given to him later) before exercising his option for or against an inquiry, and the question should be decided whether those statements should not be sworn ; the position should also be considered where the accused is triable summarily or on indictment. Who should do all this? The record of departmental committees on this subject is not reassuring: The Byrne report shows that those best acquainted with making a system work are not necessarily qualified to reform it. A Royal Commission is unnecessary for so simple and immediately needed a reform which can hardly be regarded as controversial. The matter would best be referred to the Law Reform Committee, which has so fine a record of effectively infusing justice into the law, or a body similarly constituted."

The announcement of the setting up of the Criminal Law Revision Committee, which includes Dr. Williams among its members, may provide the answer to the question, " Who should do all this? "

The reasons given by *The Times* for supporting this proposal are mainly a recapitulation of Dr. Williams' reasons for making it: the inadequacy of the Byrne Committee's reasons for recommending the retention of the preliminary inquiry ; the staleness of depositions as evidence of the events they record; the waste of time and expense which these proceedings involve. The article also refers to the prejudicial effect of the publicity which frequently surrounds such proceedings, adding: " This is something of a red herring.

Justices already have unrestricted power to close the court while any evidence is given: it is the plain duty of Crown counsel to invite them to do so in circumstances such as those of the *Adams* case. Were the inquiry often conducted like that one, the sooner this obsolescent procedure became obsolete the better. In any event it must be considered wholly impolitic to implement the well-intentioned but misconceived recommendation of the Tucker Committee—to shroud the whole examination from immediate Press publicity—while the very existence of this jurisdiction is being challenged."

Not all the comments on these proposals were as favourable as those given above. In particular, a certain amount of disquiet was expressed concerning the proposed use of police "proofs of evidence" as a basis for prosecution.

The two articles which we publish below are representative of the views of those who do not accord with Dr. Williams' proposals.

Mr. P. K. L. Danks, prosecuting solicitor, Nottingham, writes:

"I hasten to congratulate Dr. Glanville Williams not only on his excellent article in the February issue of *Criminal Law Review,* but also upon his appointment to the Criminal Law Revision Committee where I hope he can air his views successfully.

I am a full-time prosecuting solicitor and last year, for example, was personally involved in the committal of about 300 accused. In Nottingham there is practically no delay in bringing cases before the magistrates' court, which sits every day. Most days there are three courts sitting. Depositions are taken directly on to a typewriter by an experienced clerk and thanks to this and a proper preparation of the case, committals take a minimum of time. Nevertheless there is unavoidable inconvenience to witnesses. There would be greater saving, if house- etc., breaking offences could be tried summarily with consent of the accused, *i.e*., included in First Schedule to the Magistrates' Courts Act, 1952.

The chief delay between arrest and trial is caused by the lack of a suitable court sitting to try the case. Assizes are in February, June and November, and quarter sessions every five to seven weeks.

If committal proceedings in their present form are to continue I cannot see why more magistrates and staff cannot be appointed to do the work in the courts where there is delay. Too many courts think a working day is from 10.30 a.m. to 1 p.m. There is always room for a fresh bench with an assistant clerk in the afternoon. This is purely a matter for local magistrates' courts' committees to arrange.

In not agreeing fully with the opinions expressed on page 87 I may be failing in my duty, but it does not seem to me necessary, or even desirable in the interests of preventing delay, for the prosecution "to produce, where they exist, more witnesses at the preliminary hearing than will be needed to prove the point at the trial, in order to give the defence notice of their existence." All that is necessary is to serve on the accused the name and address of the witness and a statement of the evidence he can give. If the accused wants to call the witness and has any difficulty in doing so then the prosecution will help (*cf.* Mr. Christmas Humphreys at [1955] Crim.L.R. 742). In the interests of speed I would have thought that all that is necessary at committal proceedings is for the prosecution to produce sufficient evidence to create a prima facie case upon which the accused can be sent for trial. This does not conflict with the objects of committal proceedings as set out on pages 84, 85 and 86.

It is now well settled, and eminently reasonable, that the prosecution evidence must be available to the defence before trial. But if "of *enormous* importance to counsel for the defence, because it enables him to prepare his cross-examination," why not make the evidence for the defence available to the prosecution for the same reason? After all, in civil proceedings one always goes into court knowing what the defence is. A criminal trial is not a game to be won or lost—it is an impartial fact-seeking inquiry. If it helps the inquiry for one counsel to prepare his cross-examination in advance, how much better would be the inquiry if both counsel did so.

An objection to witnesses swearing to the truth of a prepared proof is that when statements are taken the questions used to elicit answers are not bound by the rules of evidence. There is a grave fear that what is being written down is being suggested by the writer. This fear is removed when the witness answers non-leading questions in a witness-box in open court, where he is also more likely to be impressed by the importance of telling the truth.

It is true that there is no provision for enabling the prosecution to come to the court of trial without its witnesses where a plea of guilty is expected, but in practice it causes no inconvenience. If an accused pleads not guilty, it is not in my experience that a jury is sworn there and then to try him. He is normally put back until a convenient moment. I can see that it might happen at a small quarter sessions where there are only one or two cases. The cure is possibly to abolish that quarter sessions. The purpose of having many quarter sessions dates from the days when travelling was difficult. Now with ample public transport there is no difficulty in travelling twenty miles or so.

As I mentioned above, I do not think that in a properly organised court, taking depositions causes any undue delay, but nevertheless for the other reasons that Dr. Glanville Williams states, I think the idea of furnishing the accused with copies of the proofs of evidence of the prosecution's witnesses a good one. But I would like to sound a note of warning. While it may be true now that the police rarely make a charge unless they have a prima facie case, it may not continue to be so if the case does not have to bear the scrutiny of the magistrates' courts. Somewhere between the police making a charge and the statements being furnished to an accused a solicitor should be introduced. In any event he must be introduced at some stage to brief counsel, and in my opinion the sooner the better. It is easy, perhaps, for those who deal in theory or with the finished product to imagine that a deposition is merely a copy of a proof of evidence. In my experience, of about 1,200 committals, in many cases (particularly if likely to be a fight) there is often a wide difference. Why? Because police statements are often taken on a leading-question basis, instead of the witness talking and the statement-taker sorting out the wheat from the chaff. This is, of course, a matter of detail because the necessary staff could be taught the art of statement-taking. But it is not a point to be ignored.

Since a solicitor for the prosecution must be introduced somewhere I would like to suggest that as few as possible be used. (I appreciate the charge of self-interest as well as the next man!) Uniformity in criminal law is most important and the standard of prosecution should be kept at the same level. It would ensure that the statements reached an accepted standard in a particular part of the country.

To my mind the most important contribution Dr. Glanville Williams' article makes is contained in the last paragraph headed "The creation of regular local courts." In my experience delay in trial is occasioned solely by the long period between sittings of trial courts. If counties and county boroughs were suitably grouped they would justify a Crown court being set up for the trial of all indictable offences. It might even result in a saving of money on the dissolution of the various county and borough quarter sessions. This Crown court, if flexible in size and suitably administered, would result in the only delay in trial being that of the time required by the accused to prepare his defence. Who can say fairer than that? "

Mr. Eric Goldrein, solicitor, writes:

"Dr. Glanville Williams, as always, makes out a very good case. However, it might be a consideration that fairness to an accused is at least as important as expedition in getting a case to trial. Of course, time would be saved if the statement of the witnesses were merely forwarded to the accused or to his solicitor, and it is clear that these statements, taken by the police were nearer in point of time to the subject-matter of the charge. However, these statements are taken by the police without any safeguard whatsoever. It must be clear that a great deal depends, when taking a statement, on the way the questions are put to the witness. It could not seriously be considered for a moment, in, for example, a case of murder, that statements of this kind and furnished in this way could properly be introduced into any criminal proceedings. It is very difficult to draw the line as to where a proper inquiry is necessary, and this line is at present drawn between indictable and non-indictable offences. It may not be the best answer, but it is clearly the fairest to the accused.

At the moment, rarely do the depositions bear any real resemblance to the original statements supplied. A great deal of the contents of the statements of the witnesses is inadmissible, being either tainted by hearsay or irrelevance. It is only at the committal proceedings that the statements of the witnesses are put into proper order and condition for perusal by the higher court in due course. The saving of time is as important to these higher courts as to the magistrates' courts in the first instance. The work of pruning and clarifying carried out in the magistrates' court does save a tremendous amount of time when the case eventually comes to trial.

It may be that only some 3 or 4 per cent. of those committed are discharged at that stage, but are those people accused and so acquitted not to be considered? They are thus saved the very considerable expense of a trial by judge and jury where they will have to be represented by counsel, and the attendant publicity, even on an acquittal, may be very much greater at that stage.

On many occasions, little or no time is wasted at all at committal proceedings. Where both defence and prosecution are experienced solicitors it is possible to complete straightforward committal proceedings very rapidly. I think the record is somewhere about eleven minutes. This time is only extended if either the facts or the argument necessitates greater time being spent. If there be a defence put forward, and if long and complex cross-examinations take place, then of course the whole procedure will last much longer. The merits of a defence cannot be measured in time, but it would surely be wrong to aim at the expedition of proceedings at the expense of the accused person. Dr. Glanville Williams points out that the procedure in this country is much swifter than, for example, on the Continent, and perhaps it would be possible to rest satisfied with the present speed. In any event, all the ancillary matters including applications for bail, legal aid and the like, are dealt with at the same time and similar hearings would be required in any event; in the absence of depositions, it would be necessary for the defence to outline the circumstances in some detail before any of these problems could adequately or properly be considered.

Witnesses may now be bailed only conditionally to appear, and if in fact a plea of 'guilty' be entered at the hearing before the trial judge, they are not further worried.

The real demerit of the present system would seem to lie only in the reluctance of magistrates to acquit at committal proceedings. In many cases, the accused has in fact to establish that he was innocent of the crime charged before the Bench will find that there is no case to answer. If there be any suspicion that he might be guilty of the charge, the easy way out for the court is to shelve the burden of responsibility by committing the accused for trial. Time and time again, there is a serious and argued plea by the defence that no jury would possibly convict on the evidence before the court, the accused is committed for trial, and subsequently acquitted. The tendency is for magistrates at committal proceedings to consider themselves as fulfilling a merely formal function of putting the evidence into proper order and not seriously to consider the real problem as to whether or not the case should go for trial. It is submitted that, were magistrates stronger at proceedings of this nature and sufficiently self-confident to come to a decision on the facts, then the figure of 3 or 4 per cent. might in fact be very much increased. Magistrates must cease to look upon themselves as mere rubber-stamps and seriously apply their minds to the question as to whether or not a reasonable jury, on the evidence submitted, would convict. It might then follow that perhaps in some 10 per cent. of all the cases so heard the accused would not be committed for trial, that in a very large percentage indeed the committal would be expeditious in the extreme, and that only in difficult cases would long and protracted committal proceedings take place. It is, after all, only in cases of this nature that it is vital to the interests of the accused person that the matters before the court should be adequately and fully explored."

Dr. Williams writes:

"I fully agree with Mr. Danks that the accused should be required to make some disclosure in advance of his defence, and hope to take this point up subsequently.

With regard to the police proofs of evidence, upon which both correspondents comment, the only positive proposal that I made at the end of my article (at p. 94) was that they should be furnished to the solicitor for the defence in place of depositions. The fact that the proof of evidence is open to suspicion, as having been induced by leading questions, is not a fatal defect for this particular purpose; all that counsel needs is some general idea of what the prosecution witnesses are likely to say, for the purpose of preparing his cross-examination and procuring suitable evidence in rebuttal. In a subsequent article I propose to consider further the possible use of proofs of evidence as substantive evidence at the trial. I hope on that occasion to consider more fully the objection that the witness's statement may have been procured by leading questions, and to make suggestions for improving the procedure for taking statements.

The only other of Mr. Danks's valuable remarks on which I should like to comment is his warning that the police may become careless in making charges if the case does not have to bear the scrutiny of the magistrates' courts. This point is difficult to follow, because the police will not wish to waste time on futile proceedings whether there is a preliminary inquiry or not. The real hurdle that the prosecution has to surmount is the jury, and that will remain. Moreover, under my proposal, if the accused thinks that the charge is an irresponsible one, he can ask for the preliminary inquiry to be held.

It seems to me that this last point is also an answer to Mr. Goldrein's remark that the 3 or 4 per cent. who are discharged at the preliminary inquiry are to be considered as justifying the inquiry. There is nothing in my proposal to take away from an accused person any right that he now has. The question is: why should we force the preliminary inquiry upon an accused person who would rather dispense with it?"

We are pleased to announce that Dr. Glanville Williams' second article on law reform, "Proposals to Improve the Perpetuation of Testimony," will be published in our next issue.

Soliciting by Men

By VERNON RENSHAW, LL.B., and ERIC GOLDREIN, M.A., *Solicitors*

Section 32 of the Sexual Offences Act, 1956, states as follows: " It is an offence for a man persistently to solicit or importune in a public place for immoral purposes." This section raises questions which are of growing interest owing to the conflicting views which have arisen of late. There have been decisions at variance in magistrates' courts, the first recorded instance seeming to have occurred in April, 1958, at Oxford. There, a woman police constable in plain clothes was accosted in the street by the driver of a car. The man was convicted under section 32 above, and a subsequent appeal was unfortunately not pursued. In July of 1958 a man was charged similarly under this section for importuning women, and the case was argued at very considerable length before the Stipendiary Magistrate for the City of Liverpool who reserved his judgment and subsequently dismissed the case on the grounds that the section did not apply to the soliciting of women by men.

The matter had already been mooted in the Wolfenden Report which refers to the question in the following terms: " We are concerned not with prostitution itself, but with the manner in which the activities of prostitutes and those associated with them offend against public order and decency, expose the ordinary citizen to what is offensive or injurious or involve the exploitation of others."

Para. 238 of the Report went on to state as follows: " It is an offence for a male person persistently to solicit or importune in a public place for immoral purposes. The maximum penalty is 6 months' imprisonment on conviction by a magistrates' court and 2 years' imprisonment on conviction on indictment. The statute does not specify the sex of the persons solicited, and in addition to its application to solicitation of males by males for the purposes of homosexual acts (as to which see para. 116) it would seem to apply also to: (a) the solicitation of males by males for the purpose of immoral relations with females (for example " touting " on behalf of prostitutes) and (b) the solicitation of females by males for immoral purposes."

It is submitted that these extracts evidence a view of the law which is not in accordance with authority. The section under discussion repeats the provisions of section 1 (1) of the Vagrancy Act, 1898; all the reported cases arising out of this section refer to solicitation by men of men. It is fair to say, however, that the section in that Act, is in fact headed "Trading on Prostitution," whilst the heading under the new Act is "Solicitation by Men."

The immediate query is raised as to what is the meaning of this heading. It can be read to mean soliciting "between men" or "by men of a person whose sex is undefined." The heading is, of course, not a part of the Act, but it is certainly a factor to be considered. Then the arrangement of the sections themselves is difficult to construe. Section 32 is sandwiched between the sections dealing with "Prostitution, procuration, etc." and "Suppression of brothels." It could be argued that one might have expected to have found it in the group headed "Unnatural offences" had the section related only to the solicitation of men by men. This is not really a strong indication either way, because soliciting by prostitutes is not expressly covered by the 1956 Act at all, as these offences can be dealt with under the provisions of the Town Police Clauses Act, 1847, section 28 of which states as follows: "Every common prostitute or night walker loitering and importuning passengers for the purpose of prostitution to the annoyance of residents or passengers" is liable to a fine of 40s. or 14 days' imprisonment.

Again, under the Vagrancy Act, 1824, section 3 states: "Every common prostitute wandering in the public streets or public highway, or in any place of public resort, and behaving in a riotous or indecent manner" is liable on a first conviction to a fine of £5 or a term of imprisonment of not more than 1 month."

Alternatively, these cases fall to be dealt with in some cities by local Acts, or again by the contemplated Act dealing with street offences.

In any event, for a period of 60 years, the section in the old Act (section 1 (1) of the Vagrancy Act, 1898) has been restricted to the case of a man soliciting another man for immoral purposes. There are no recorded cases in this country which lead to any other interpretation. Indeed, if any man were found to have a conviction for "soliciting" the average man, or lawyer, would inevitably assume that such conviction related to homosexuality. If the object aimed at is to prevent offensive behaviour and the affrightening of public morals this is covered already by existing enactments, or in Liverpool by the Liverpool Corporation Act, 1921, section 416 which states as follows: "Every person should be liable to a penalty not exceeding 40s. who in any street or place of public resort . . . shall . . . behave in a disorderly or offensive manner, whereby a breach of the peace may be occasioned."

Whilst it would seem that existing and contemplated legislation may adequately cover the situation, the only merit of proceeding under section 32 of the Sexual Offences Act, 1956, in relation to importuning women by men would arise from the greater penalties that can be imposed. In fact, the Chief Constable of a large town has adverted to this aspect of the case and given warning that it is his intention to institute proceedings under section 32 for offences of this type.

If section 32 be construed as dealing exclusively with solicitation between men, then the "immoral purposes" are also illegal and criminal and therefore easy to define—for example, sections 12 and 13 of the Sexual Offences Act, *i.e.*, buggery and the like. These offences are grouped together in the Act as "unnatural offences," and the illegality is as clear as the immorality. The court does not have to argue on questions of immorality, because the offences, if committed, would clearly be illegal. There is, on the other hand, nothing illegal about the act of intercourse between a man and a woman, provided that no annoyance is caused to passengers, and the act itself is not likely to cause a breach of the peace. If, however, the section were so construed as to make it possible for a man to be convicted of picking up a prostitute, then the court would have to consider on every occasion whether the purpose of his action was "immoral." The section does not, of course, deal with the case of a man picking up a prostitute as such, and could presumably be extended indefinitely to a man importuning any woman in a public place for purposes which might be likely to result in sexual intercourse. Were the court to sit as a court of morals, any plea by an intending lover to his girl friend could clearly be construed as being an importuning for immoral purposes if pursued in a public place. An importunate man might be properly convicted under this section at any time if he were to press his suit in public. It is, perhaps, hardly necessary to elaborate this argument nor to advance examples in the works of the great poets of exhortations to what could only be construed as immorality. On the other hand it could be argued that the gravamen of this action so far as immorality is concerned lies in the public nature of the place. The section could be construed as aiming at protecting public morality.

Whichsoever way the section be argued, so long as it is contended that it includes solicitation of a woman by a man, then quite inevitably the court has to decide whether or not the action complained of was immoral. The court would then have to make its own yardstick by which to judge immorality, and would sit in effect as a court of morals. This is completely foreign to the whole trend of criminal law, and would inevitably lead to the holding of different views by different courts with consequent difficulties on all sides. It is open to Parliament at any time in, for example, the new Street Offences Bill, or otherwise, to make provision for dealing with conduct of this kind, but it is submitted that in matters of criminal law the views of Parliament must be clearly and accurately interpreted. It would not, perhaps, be proper to extend the provisions of an old section to make what is in effect a complete change in the law without legislative approval.

Your contributors themselves cannot agree over the interpretation of this section, and it is to be hoped that this question will be settled shortly, at least by a higher court, if not by legislative measures.

Practice and Procedure

Exemptions from paying damages for assault

Justices who have heard " upon its merits " a charge of assault under either section 42 (common assault) or section 43 (aggravated assault) of the Offences against the Person Act, 1861, may, by section 44 of that Act, dismiss the complaint if they " shall deem the offence not to be proved or shall find the assault or battery to have been justified or so trifling as not to merit any punishment." The defendant will be entitled to a certificate of such dismissal and, having obtained it, will be " released from all further or other proceedings, civil or criminal, for the same cause." This is enacted by section 45 of the statute, which also confers the same exemption from further legal action if " having been convicted, (he) shall have paid the whole amount adjudged to be paid or shall have suffered the imprisonment."

It seems rather peculiar that assault and battery should have been singled out for special treatment in this way. There seems no comparable provision relating to any other offence. In the case of felony, criminal proceedings must come before civil proceedings, but nothing prevents compensation being claimed after the offender has been punished. It would be theoretically possible for a person assaulted to sue his assailant for damages in a civil court and afterwards bring criminal proceedings under section 42 of the Act of 1861. But the intention of that legislation seems to have been to stop the law being set in motion in both directions at the instance of the injured party.

It is not in all cases, however, that a hearing in a magistrates' court will result in a decision which releases the defendant, pursuant to section 45 of the Act, from liability to civil proceedings. From *Hartley* v. *Hindmarsh* (1866) L.R. 1 C.P. 553 it appears that, if the adjudication is an order to enter into recognisances to be of good behaviour or keep the peace, the justices can refuse a certificate of dismissal. A defendant in such a case who is not fined or imprisoned for the offence will not be able to bring himself within the terms of any of the specified exemptions.

Nowadays the defendant who is convicted of assault under section 42 or 43 may find himself ordered to be detained within the precincts of the court or at a police station, or (if of the appropriate age) at a detention centre. Would he be held to have " suffered the imprisonment " within the meaning of section 45 ? If not, it would still be open to the complainant to claim damages from him in a civil court. In the absence of a High Court decision, no certain answer can be given to the question. But it involves an extension of the same matter of principle which was invoked by Hawkins J. in *R.* v. *Miles* (1890) 54 J.P. 549 when, on another point under the same section, he said " It certainly could never have been intended by the legislature that a person whose offence was undeserving of punishment should be in a worse position than one who has suffered substantial punishment."

The case just mentioned was argued, in part, on the effect of a dismissal under the since repealed section 16 of the Summary Jurisdiction Act, 1879—an early forerunner of the Probation of Offenders Act, 1907, which itself has been replaced by the Criminal Justice Act, 1948. The court, in the end, decided the case on other considerations. Hawkins J., however, was " strongly inclined to think " that such a dismissal entitled the defendant to the privileges of section 45 of the 1861 Act; although Pollock B. said: " I should pause before I came to such a conclusion, as the language of this section is certainly not in accord with that of section 16." Coleridge L.C.J. merely " concurred " in the judgment of Pollock B., and Charles J. simply found the question " unnecessary to decide."

When dealing with an accused either by absolute discharge, conditional discharge, or a probation order, the court must have " regard to the circumstances, including the nature of the offence and the character of the offender." No considerations as to the character of the offender, however, enter into an adjudication of dismissal under section 44 of the Offences against the Person Act, 1861. Whatever might have been the position with regard to section 16 of the Summary Jurisdiction Act, 1879, it would seem difficult, therefore, to argue that an absolute discharge of a person convicted of common assault entitled him to the protection of section 45 of the 1861 Act. It would be even more difficult to argue that a conditional discharge—and almost impossible to argue that a probation order—was the equivalent of a dismissal under section 44 of that Act. Yet most courts nowadays would use their powers under the Criminal Justice Act, 1948, instead of under the Offences against the Person Act if they decided that a proved assault did not merit punishment. It is true, of course, that, in an adjudication under the Criminal Justice Act, a compensation order may be included; this, however, is not only purely at the discretion of the court but also ancillary to its main concern, which is with the offender.

The legal situation is so full of uncertainties and oddities because a rather illogical provision of an oldish law has had its anomalies aggravated by the operation of subsequent legislation. Subsequent legislation, on the other hand, also provides a way out of the main difficulties. Once offences under section 47 of the Offences against the Person Act, 1861, became triable summarily with the consent of the accused, there was no compelling reason to have recourse to section 42 at all. A charge of common assault or assault occasioning actual bodily harm, if dealt with summarily by a magistrates' court under section 47, is no bar to subsequent civil proceedings for damages in respect of injuries sustained. Unfortunately, however, in many of the assault cases coming before justices, the defendant would not be " worth powder and shot " in the county court as far as a compensation claim was concerned. The best solution of the problems raised would really be fresh legislation giving magistrates power to award damages as part of an adjudication under section 42 or section 43 of the Offences against the Person Act. There would then be good ground for exempting the defendant from further legal liability. [A. E. JONES.]

Summary Justice

Betting houses

Five persons were fined a total of £80 for offences under sections 1 and 3 of the Betting Act, 1853. Police raided the premises in question after seeing an advertisement for " pools service " ; they found 7,405 completed football coupons and £376 in money. The occupier of the premises, Frank Littler, pleaded guilty to being the occupier of premises used for betting and was fined £50. Two married couples pleaded guilty to assisting in conducting a betting house ; Mr. and Mrs. Brittain were each fined £5 ; Mr. and Mrs. Yates were each fined £10: Birmingham Magistrates' Court (*Birmingham Mail*, February 16).

Children

For exposing a child under twelve years of age to the risk of burning by leaving her (and other children) in a room with an unguarded open fire, contrary to the Children and Young Persons Act, 1933, s. 11, as amended, the mother of a child who was fatally burned was fined £1. Another woman was fined £1 for aiding and abetting her. The two women had gone out for a drink leaving four children in the room with an unguarded fire: Kendrick, Leigh (Lancs.) Magistrates' Court (*Birmingham Mail*, February 18).

Road traffic

Fined a total of £7 for offences under the Motor Vehicles (Construction and Use) Regulations, 1955, Alvin Fitzgerald told the court that he had neglected his car because he was saving up to get married. The car was found by a police constable in a state of disrepair, having inefficient steering and speedometer, no driving mirror and being otherwise in a dangerous condition: Stourbridge Magistrates' Court (*Birmingham Mail*, February 3).

Case and Comment *

AVIATION

Flying within 1,000 yards of an assembly—whether a procession is an assembly.

D. P. P. v. Roffey

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Ashworth JJ.: February 6, 1959: *The Times*, February 7, 1959.[1]

The Director of Public Prosecutions appealed against the dismissal of an information charging the respondent with flying an aircraft within one thousand yards of an assembly in the open air of more than a thousand persons assembled for the purpose of witnessing or participating in an organised event, contrary to the Air Navigation Order, 1954. The respondent had flown his aircraft within this distance of the Hydrogen Bomb Protest March on the main Reading-Aldermaston road to enable a television cameraman to take photographs. The justices held that the March was a procession and that it could therefore not be said to be " an assembly."

Held, allowing the appeal and remitting the case to the justices with a direction to convict, that an assembly can be stationary or in motion. Having regard to the mischief aimed at by this regulation, an assembly meant no more than a gathering of persons.

Per Donovan J.: In this case the regulations were broken not by mistake or inadvertence but for commercial ends. Although the matter of punishment was one for the justices, he (His Lordship) hoped that they would not think the offence a trivial one. [D. C.]

Commentary. It seems always to have been accepted that a procession is an assembly for the purposes of the crime of unlawful assembly and it is, with respect, reasonable that a similar construction should be put upon the order in question.

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* Reported, unless otherwise stated, by David Calcutt and Henry Palmer, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the Crown: *Rodger Winn* (instructed by the Director of Public Prosecutions). The respondent did not appear and was not represented.

EVIDENCE

Appeal—application to prove that witness committed crime

R. v. Bowman

Court of Criminal Appeal: Lord Parker C.J., Donovan and Ashworth JJ.: February 2, 1959.[2]

B. was convicted at quarter sessions of larceny of a handbag. At the trial his defence was that he had not stolen the handbag and had been in company with one M. during the whole of the relevant time. M. was called to support the defence. B. applied to the Court of Criminal Appeal for leave to call further evidence to prove that the offence was in fact committed by M.

Held, that the further evidence could not be admitted. It was said that M. had confessed to a number of people both before and after the trial that he had stolen the handbag; but most of those witnesses had been available at the trial and additional evidence would not be allowed in this court unless the witnesses had not been available at the time of the trial. The real difficulty was that B. chose to call M. at the trial to support a defence which was in effect an alibi that he and M. had been together during the relevant time. That defence was entirely inconsistent with the suggestion that M. was himself the thief. In those circumstances the application to admit further evidence would be refused and the appeal would accordingly be dismissed. [H. P.]

Commentary. See *R.* v. *Foley,* p. 286, *post.*

Incriminating statement by accomplice—hearsay rule—admissibility

R. v. Spencer

Court of Criminal Appeal: Lord Parker C.J., Donovan and Ashworth JJ.: February 10, 1959.[3]

S. was convicted with his father at quarter sessions of receiving. According to the police evidence at the trial the father made an incriminating statement in S.'s presence; but the father denied making the statement and S. said that, if it was said, he never heard it. S. appealed to the Court of Criminal Appeal on the ground that the jury were not warned that the father's statement (if any) was not evidence against S. unless made in S.'s presence.

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[2] For the appellant: *A. Morrison* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Escott Cox* (instructed by Blythe, Owen, George & Co., Coventry).

[3] For the appellant: *G. Baker* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *J. S. Snowden* (instructed by the Town Clerk, Bradford).

Held, that the jury ought to have been warned to put the father's statement out of their minds in considering the evidence against S. unless they were satisfied that S. was present when it was made. But in the circumstances of this case the jury properly directed must have returned a verdict of guilty. The proviso to section 4 (1) of the Criminal Appeal Act, 1907, would, therefore, be applied and the appeal would be dismissed. [H. P.]

Commentary. Admissions and confessions are exceptions to the hearsay rule to the extent that they are evidence of the facts stated against the party making them. They are not, however, evidence against other persons.

Where a statement incriminating him is made in the presence of an accused person, it is evidence against him only in so far as he, by his words, conduct or demeanour, has accepted it as true. The mere fact that a statement is made in the presence and hearing of the accused is, it seems, sufficient to render it admissible in evidence, but the jury should be warned that they may use against the accused only so much of the statement as he has acknowledged to be true: *R.* v. *Christie* [1914] A.C. 545. If, in the present case, S was not present when his father made the statement, it was plainly inadmissible against him. If he was present, but did not hear it, then, it is submitted, it should equally be inadmissible.

Indecent assault—possession of obscene photograph—exhibit at trial —prejudicial

R. v. Bartlett

Court of Criminal Appeal: Lord Parker C.J., Donovan and Ashworth JJ.: January 26, 1959.[4]

B. was convicted at quarter sessions of indecent assault on a woman. Upon B. being searched after the alleged incident there was found in his pocket an obscene photograph. At the trial, where B. was unrepresented, no objection was made to the production of the photograph as an exhibit. B. appealed to the Court of Criminal Appeal on the main grounds that the photograph was inadmissible or, alternatively, if it was admissible the trial judge ought to have excluded it on the basis that it was highly prejudicial and of little evidential value.

Held, allowing the appeal, that the prejudicial effect of the photograph upon the jury must have been very great. Its evidential value, on the other hand, if admissible was small. It was not in this case necessary to decide whether or not the photograph was admissible because this court was clearly of opinion that it ought in the discretion of the court to have been excluded. It was only fair to say that the trial judge was never in fact asked to exercise any discretion in the matter; the photograph went in, as it were, automatically. But in the view of this court it ought to have been excluded. Accordingly the conviction would be quashed. [H. P.]

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[4] For the appellant: *D. N. Keating* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *W. M. F. Hudson* (instructed by the Solicitor, Metropolitan Police).

Commentary. The evidence of the photographs, if admissible, would be allowed under the "similar facts" rule. In *Thompson* v. *R.* [1918] A.C. 221, a charge of gross indecency with boys, it was held that evidence was properly admitted of the facts that the accused, when arrested, was in possession of powder puffs and that a number of indecent photographs were found in a locked drawer in his rooms. Great emphasis was laid, in that case, on the fact that Thompson had set up the defence of mistaken identity and adduced evidence to prove an alibi. It was for the specific purpose of rebutting this defence that the evidence in question was held admissible by the House of Lords. Lord Sumner said: "Before an issue can be said to be raised which would permit the introduction of such evidence so obviously prejudicial to the accused, it must have been raised in substance if not in so many words, and the issue so raised must be one to which the prejudicial evidence was relevant. The mere theory that a plea of not guilty puts everything material in issue is not enough for this purpose." Though this statement of the law is contradicted in *R.* v. *Sims* [1946] K.B. 531 (C.C.A.) and accepted only subject to a qualification in *Noor Mohammed* v. *R.* [1949] A.C. 182 (P.C.) it is clear that *Thompson* is not necessarily authority for the admission of the photograph in such a case as the present, where it does not appear what, if any, defence was raised.

The court always has a discretion to exclude similar fact evidence, even though technically admissible, if its probative value is slight when compared with its prejudicial effect: *Noor Mohammed* v. *R.* (above) at p. 192; *Harris* v. *D. P. P.* [1952] A.C. 694, 707.

Wounding with intent to murder—evidence of victim heard on appeal

R. v. Foley

Court of Criminal Appeal: Lord Parker C.J., Donovan and Hinchcliffe JJ.: February 16, 1959: *The Times*, February 17, 1959.[5]

F. was convicted at the Central Criminal Court of wounding with intent to murder one R. At the time of the trial R. was still suffering from his injuries and was not, therefore, called as a witness. R. having recovered sufficiently to give evidence, the Court of Criminal Appeal gave leave to call him by way of further evidence. R., giving evidence, said that he did not know who was his assailant, but he was certain that it was not F. F. also appealed on the ground of misdirection on the question of proof of the intent necessary to support the charge of wounding with intent to murder: the direction complained of being: " If a person who is in a state of mind that he knows what he is doing chooses to do certain acts, the law says that the test of intent must be the test of a reasonable man."

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[5] For the appellant: *J. Elson Rees* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Christmas Humphreys* (instructed by the Director of Public Prosecutions).

Held, that this court, having heard R.'s evidence, felt that R. remembered really nothing about it and there was no weight to be attached to his evidence. Even if that evidence had been before the jury, this court was satisfied that the verdict would have been unaltered. As to the alleged misdirection, it was not enough for the prosecution to rely upon the presumption that a man intended the natural consequences of his act. Where a specific intent was alleged and was a necessary constituent of the offence, as here, it was for the prosecution to prove that intent. The proper direction as to proof of that intent was, as had been laid down in *R.* v. *Steane* [1947] K.B. 997, that the jury were entitled to seek aid from the presumption (that a man intends the natural consequences of his act), yet they must consider the totality of the evidence and on that decide whether they were satisfied that the alleged intent existed. However, in the circumstances of this case there was ample evidence upon which the jury could, and indeed must, have concluded if properly directed that the necessary intent was proved. Accordingly the proviso to section 4 (1) of the Criminal Appeal Act, 1907, would be applied and the appeal would be dismissed.

[H. P.]

Commentary. The Court of Criminal Appeal has power to hear fresh evidence under section 9 of the Criminal Appeal Act, 1907, but the practice is to act on this power only in special circumstances, *e.g.*, where it is shown that the proposed witness was not available at the trial, or that some point, which could not have been foreseen, arose at the trial on which the evidence would have been material. See Archbold (34th ed.), § 899, *R.* v. *Musial* [1956] Crim.L.R. 843 and *R.* v. *Harrigan* [1957] Crim.L.R. 52. In *R.* v. *Collins* (1950) 34 Cr.App.R. 146 Lord Goddard C.J. said that the court allows further evidence only in exceptional cases because " It is very easy after a person has been convicted to find witnesses who are willing to come forward and say this, that, or the other thing." The test to be applied by the court in considering further evidence is the same as that which is used to decide whether the proviso to section 4 of the Criminal Appeal Act, 1907, should be applied, *i.e.*, that the conviction must be quashed unless, if the evidence had been available at the trial, " no reasonable jury properly directed throughout would, or could, have come to any other conclusion than that to which they did come and that no miscarriage of justice has actually occurred."

With regard to the second point, the law has, it is respectfully submitted, been correctly stated by Denning L.J. in *Hosegood* v. *Hosegood* (1950) 66 T.L.R. 735: " When people say that a man must be taken to intend the natural consequences of his acts they fall into error: there is no ' must ' about it; it is only ' may.' The presumption of intention is not a proposition of law, but a proposition of ordinary good sense. It means this: that, as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them. But while that is an inference, which may be drawn, it is not one which must be drawn. If, on all the facts of the case it is not the correct inference, then it should not be drawn." This explanation of the rule accords with the remarks of Lord Goddard C.J. in *R.* v. *Steane* [1947] K.B. 997, 1004.

When the court insists on the application of a subjective test of this nature in cases like those of the present crime and of lesser offences (*cf. R.* v. *Cunningham* [1957] 2 Q.B. 396) it is all the more remarkable that it should have been held in *R.* v. *Ward* [1956] 1 Q.B. 351 that proper test to apply in the case of a charge of murder is the objective one of the reasonable man. See S. Prevezer, " Murder by Mistake " [1956] Crim.L.R. 371 and J. T. Lowe, " Murder and the Reasonable Man " [1958] Crim.L.R. 289.

EXPLOSIVES

Unlawful possession—knowledge not sufficient to prove possession

R. v. Rutter and White

Court of Criminal Appeal: Lord Parker C.J., Donovan and Ashworth JJ.: February 2, 1959: *The Times*, February 3, 1959.[6]

R. and W. were convicted with another man " X " at the Central Criminal Court of knowingly being in possession or control of explosive substances, contrary to section 4 of the Explosive Substances Act, 1883. The facts were that X and his wife were tenants of a small office. R. had access to that office, came there quite frequently and sometimes paid £1 per week. W. had no connection with X other than a casual business relationship. When the police arrived at the office with a search warrant X and W. were there. They produced their search warrant in the presence of both of them and went through into a back office where they found, high up on a shelf, a quantity of gelignite. They returned to the outer office just as R. arrived. W. then wrote on a cigarette package: "The law search," and conveyed that message to R. R. wrote on it: "Can I help?" and, when asked by the police what he meant by that, he said: "Well, it explains itself, to get out before you find the stuff." The police had not mentioned at that stage what the stuff was. Later on R. said: "I have nothing to do with the stuff, that is down to them." When W. was asked whether she knew what had been found in the other office she said: "I suppose so, what can I say, I had better not say anything until I have been advised." On appeal to the Court of Criminal Appeal:

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[6] For the appellant: *N. S. Lethbridge* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *J. H. Buzzard* (instructed by the Director of Public Prosecutions).

Held, allowing the appeals, that although there was abundant evidence that both R. and W. knew of the presence of gelignite, mere knowledge was not, of course, sufficient to constitute the offence. It had to be proved that the accused were in possession or control of the substance and it was impossible to say that there was any evidence of such possession or control. The convictions were founded on mere suspicion. Accordingly, the convictions would be quashed. [H. P.]

Commentary. A man may be convicted of an offence of being in possession when the actual physical possession of the thing in question is vested in another, but it is held for a common purpose. *R.* v. *Smith* (1818) R. & R. 368; *R.* v. *Thompson* (1869) 21 L.T. 397. In the present case there was, apparently, no evidence of a common purpose.

FRAUD IN WAGERING

Meaning of "by any fraud . . . win from any other person to himself," etc.—scheme involving non-payment of losses

R. v. Clucas and O'Rourke

Court of Criminal Appeal: Lord Parker C.J., Donovan and Ashworth JJ.: February 2, 1959.[7]

C. and O. were convicted at quarter sessions, *inter alia*, of a number of offences of fraud in wagering, contrary to section 17 of the Gaming Act, 1845. The prosecution's case was that C. and O.

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[7] For the appellant Clucas: *C. S. Hill* (instructed by the Registrar, Court of Criminal Appeal). For the appellant O'Rourke: *N. R. Blaker* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Michael Lee* (instructed by Bradley, Trimmer & Son, Alton).

had operated a scheme whereby one of them would contact a bookmaker, giving a false name and pretending to be engaged on a works contract; the bookmaker would be asked to accept bets on behalf of the men on the site from C. or O. When there were winnings, C. and O. collected them and, when there were losses of any substantial amount, they moved on to another place. They appealed to the Court of Criminal Appeal on the main ground that their conduct did not come within section 17 of the Gaming Act, 1845.

Section 17 of the Gaming Act, 1845, provides that: "Every person who shall, by any fraud . . . in wagering on the event of any game, sport, pastime or exercise, win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence."

Held, dismissing the appeals, that there was here a fraud in wagering within the principles laid down in *R.* v. *Leon,* 30 Cr.App. R. 120. It had been argued that the money had to be won through some fraud in the game, etc., *i.e.,* that fraud in inducing bookmakers to accept bets as here by pretending to act for other people, acting in a false name and with no intention of paying losses, was not a fraud in wagering because it was not a fraud in the race itself. *Leon's* case decided that a person could be found guilty under this section where there was fraud in the actual wagering. This court felt no doubt that the decision in that case was right and that the question for the jury was: "Were the accused at the time they made these bets with bookmakers intending to cheat and defraud those bookmakers by not paying losses." In these circumstances the appeals must fail. [H. P.]

Commentary. *Cf. R.* v. *Clucas* [1949] 2 K.B. 226 where, on very similar facts, it was held there could be no conviction of the two accused for obtaining money by false pretences. The money paid by the bookmaker was not *obtained* by false pretences, as the effective cause of the payment was the horse winning and not the false representations.

In *R.* v. *Leon* it was held that a backer who enters into a credit betting arrangement with a bookmaker, intending to accept money if he wins, but not to pay if he loses, is guilty of fraud in wagering under the section. That case was, therefore, clear authority for the conviction in the present case. The case is forcefully criticised in Russell on *Crime*, 1376, and Kenny, *Outlines of Criminal Law*, 343, on the ground that "although it could be contended, and was in effect held by the court, that it was because of the appellant's deceit and fraudulent holding of himself out as an honest backer that the prosecutor had paid him the sums which he had won, yet it is surely quite plain that it was not by such fraud that he had won the bet. The reason that he won the money was because the horses which he selected had come in first in the races in which they were engaged." The similarity of the facts in the present case to those in *Clucas* (1949) lends point to this criticism. If such fraud is not the cause of the payment, how can it be said that the accused has, by the same fraud, won "from any other person to himself . . . any sum of money"?

The Court of Criminal Appeal regards itself as bound by its own decisions, subject to the exceptions (of rather uncertain extent) established by *R.* v. *Taylor* [1950] 2 K.B. 368.

HOMICIDE

Capital murder—"course or furtherance of theft"

R. v. Jones

Court of Criminal Appeal: Lord Parker C.J., Donovan and Ashworth JJ.: January 26, 1959: *The Times*, January 27, 1959.[8]

J. was convicted at assizes of capital murder. The facts were that J. broke into a shop where he first collected some cigarettes and put them into a carton ready to take away and then went upstairs to a safe. The safe was open and J. put about £70 in silver and notes into his pocket. At this point T., the manager of the shop, entered the premises and came up the stairs for the purpose of closing the safe. When T. was near the top of the stairs he received a blow from J. which fractured his skull, as a result of which he died. J.'s defence was, first, that he merely pushed T. who must have fractured his skull in falling, and second, that even if this was murder it was not murder done "in the course or furtherance of theft" within the meaning of the Homicide Act, 1957, because he had already decided to leave the premises when T. entered. On appeal to the Court of Criminal Appeal:—

Held, dismissing the appeal, that as regards the first defence it was sufficient to say that there was ample evidence upon which the jury could have concluded that this was murder and not manslaughter. The real point taken before this court was that this did not constitute capital murder because J. believed the theft to be complete. This court did not think that argument was sound; for if a man having stolen something, in order to avoid detection and while still on the scene of his theft, committed murder, it was difficult to see why that should not be within the words "in the course of theft." In the opinion of this court the summing-up of Lord Sorn in *H.M. Advocate* v. *Graham* (1958 S.L.T. 167) was perfectly correct, namely: "Now you have just heard it suggested to me by counsel for the defence that murder is only done in the course of theft if the man did it in order to get on with the theft after he had done the murder. . . . I have only got to tell you that I do not agree with that. It is a question of what is meant by the course of a theft, and I think that the course of a theft is begun when perpetration is begun; that is to say that it covers the period of attempt as well as the period of completion; the attempt of the crime as well as the crime; and I say that if a burglar is interrupted in that course, the course of perpetration, and if he murders even in order to get away, not with the idea of going on, but with the idea of getting away, it still is murder done in course of theft." In those circumstances the appeal would be dismissed. [H. P.]

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[8] For the appellant: *Bernard Gillis, Q.C., Lionel H. Scott* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Geoffrey de P. Veale, Q.C., R. Withers Payne* (instructed by the Director of Public Prosecutions).

Commentary. The court must have been satisfied that J. intended or foresaw that his act was likely to cause death or grievous bodily harm or, at least, that a reasonable man in his position would have foreseen that death or grievous bodily harm was likely to result: *R.* v. *Ward* [1956] 1 Q.B. 351. If the blow—being plainly unlawful—was not likely and was not intended to cause death or grievous bodily harm, then the resulting death would, under the Homicide Act, 1957, have amounted to manslaughter. Before that Act, such a killing would have been murder even in the absence of foresight or likelihood of death or grievous bodily harm, under the constructive malice rule laid down in *D. P. P.* v. *Beard* [1920] A.C. 479 and now abolished by section 1 of the Act.

The interpretation of "in the course or furtherance of" adopted in this case seems to be inconsistent with that advanced in Russell on *Crime* (11th ed., by J. W. C. Turner, pp. 554 and 615) and Kenny's *Outlines of Criminal Law* (17th ed. by J. W. C. Turner, p. 146). It is there suggested that "in the course of" and "in furtherance of" mean different things but that "both must relate to what is done before the felony has been completed. The reasons are (a) that once a felony has been committed it is automatically completed and becomes a past event; hence its 'course of commission' is also at an end; and (b) that the word 'furtherance' means 'the action of helping forward' and points to something which aids the attainment of some objective" (Kenny, p. 146).

In the present case the theft was completed as soon as J. moved the money with the intention of stealing it. According to the test laid down in Russell and Kenny, therefore, he was no longer "in the course or furtherance of theft." The direction given by Edmund Davies J. in *R.* v. *Stokes* [1958] Crim. C. & C. 64 accords with the present ruling. The rejection of the test advanced by Mr. Turner raises the difficult question of where the line is to be drawn. Is the burglar still in the course of committing theft (a) as he walks out of the house? (b) as he drives home in his car? or (c) as he shows the stolen property to his wife?

INDICTMENT

Affray—making of an affray in "divers streets"—whether bad for duplicity

R. v. Woodrow and Others

Court of Criminal Appeal: Lord Parker C.J., Donovan and Ashworth JJ.: February 9, 1959: *The Times*, February 10, 1959.[9]

The appellants, with others, were convicted at the Central Criminal Court of a number of offences including that of making an affray. The count of affray was in these terms: "That on the 31st day of August, 1958, and the 1st day of September, 1958, in divers streets being public places in the neighbourhood of Bramley Road in the Royal Borough of Kensington, you unlawfully fought and made an affray." The appellants appealed to the Court of Criminal Appeal on the main grounds: (1) that the count charging affray was bad for duplicity in that it charged the making of an affray on two separate days and in divers streets, and (2) that there was a misdirection by the recorder in directing the jury that an affray was any disturbance made in public either by fighting or in some other way which was calculated to frighten Her Majesty's subjects.

Held, dismissing the appeals, that as to (1) the count was perfectly capable of covering the case of a body of persons milling from one street to another over a period of time. On the face of it, therefore, the count was good, although it might be the subject for particulars which, in this case, were in effect provided by the further counts of the indictment. As to (2) this court thought it right (as had been argued) to say that not every disturbance would necessarily make an affray, but the recorder had directed the jury that the nature of the affray in this case was the fighting. This court could not see that there had been any misdirection. Accordingly, the appeals would be dismissed. [H. P.]

Commentary. If the indictment had related to two separate incidents on different days, no doubt the objection that it was bad for duplicity would have been well-founded. In fact it related to only one incident, lasting from about 8.30 p.m. on August 31 until 12.30 a.m. on September 1.

"An affray is the fighting of two or more persons in a public place to the terror of Her Majesty's subjects, and is a misdemeanour at common law." (Russell on *Crime* 292). It is open to a jury to find that the circumstances amounted to an affray although no evidence is given by any person that he was actually put in terror: *R.* v. *Sharp and Johnson* [1957] 2 W.L.R. 472.

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[9] For the appellants: *M. Graham* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Christmas Humphreys* (instructed by the Solicitor, Metropolitan Police).

OBSCENE LANGUAGE

Local by-law—no evidence of annoyance—inference of annoyance

Nicholson v. Glasspool

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Ashworth JJ.: February 4, 1959: *The Times,* February 5, 1959.[10]

The appellant was convicted under a local by-law for Good Rule and Government of using obscene language in a street to the annoyance of a person therein. Before the justices, the prosecution led evidence that the appellant used obscene language in a busy street, but no evidence that any person was annoyed, and the appellant thereupon submitted that he had no case to answer. The justices were of opinion that they were entitled to infer annoyance from the circumstances of the case, but they permitted the prosecution to recall the police officer who had charged the appellant, who stated that he had been annoyed.

The grounds of the appeal were that, although in the similar case of noise the court is entitled to infer, in the absence of evidence, that the noise caused annoyance, obscene language stands upon a different footing; such language may or may not annoy the person who hears it, and evidence of annoyance should therefore be adduced. The justices were wrong to allow such evidence to be called after the prosecution case had been closed.

Held, dismissing the appeal, that the case of *Raymond* v. *Cook* [1958] 1 W.L.R. 1098, applied. There was for these purposes no difference between language and other noises. There was evidence that this language was not used in a whisper, and it was of a nature calculated to annoy. The justices were entitled to infer that it did cause annoyance to persons in the street. [D. C.]

Commentary. *Cf. John* v. *Heath* [1958] Crim. C. & C. 60. While it must be respectfully agreed that there is no difference between music and obscene language for this purpose, it is submitted that the effect of these decisions is to render the requirement of annoyance in such statutes nugatory. While, no doubt, actual annoyance remains part of the offence (*cf. Allen* v. *Baldock* (1867) 31 J.P. 311) such annoyance will, it seems, be presumed against the accused when, in the view of the court, annoyance is the natural result of his actions. In most cases it will be impossible for the accused to prove the negative by showing that no one was annoyed.

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[10] For the appellant: *Roy Calvocoressi* (instructed by Messrs. Stitt & Co. for Messrs. Newstead & Walker, Otley, Yorks). For the respondent: *H. C. Beaumont* (instructed by R. C. Linney, Esq., County Prosecuting Solicitor, Wakefield, Yorks.).

Under the by-law in question it would seem that the language must have been used in the street. In *Brabham* v. *Wookey* (1901) 18 T.L.R. 99 it was held that the accused was guilty, under the Bristol Improvement Act, 1840, of using indecent language to the annoyance of passengers where the indecent words were used inside his house and, the doors being open, were heard by two policemen passing outside.

SENTENCE

Preventive detention—eligibility—previous sentence of preventive detention—no notice under Criminal Justice Act, 1948, s. 23.

R. v. Scaife

Court of Criminal Appeal: Lord Parker C.J., Donovan and Hinchcliffe JJ.: February 16, 1959: *The Times,* February 17, 1959.[11]

S. was convicted in August, 1956, at quarter sessions of attempted office-breaking and sentenced to eight years' preventive detention. He had been refused leave to appeal against his conviction in October, 1956. At the trial the prosecution had endeavoured to satisfy the requirements of section 23 of the Criminal Justice Act, 1948, as to S.'s eligibility for preventive detention by proof that he had previously been sentenced to preventive detention. On a reference to the Court of Criminal Appeal under section 19 (*a*) of the Criminal Appeal Act, 1907:

Held, that the circumstances were similar to those in *R.* v. *Evans,* 40 Cr.App.R. 165, which had been decided about a month after S.'s application for leave to appeal had been refused. In that case it had been decided that it was not sufficient in proving convictions that would make a man eligible for preventive detention to prove that he had had preventive detention before. Accordingly S. was not strictly eligible for preventive detention and, as this was only an attempt, so that it would be wrong to substitute a term of imprisonment greater than that which could be imposed for the substantive offence, a sentence of five years' imprisonment would be substituted for the sentence of preventive detention. [H. P.]

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[11] The appellant appeared in person. The Crown was not represented.

Commentary. Section 23 of the Criminal Justice Act, 1948, provides that " evidence that a person has previously been sentenced to corrective training or preventive detention shall be evidence of the convictions and sentences which rendered him liable to that sentence." *R.* v. *Evans* made it clear that this subsection relates only to proof of convictions in court when they are not admitted by the accused. The notice which, under section 23 (1), must be served on the accused at least three days before the trial, must specify the convictions which rendered him liable to the previous sentence of preventive detention. If the accused then denies previous convictions the sentence of preventive detention is evidence against him, the question being determined by the verdict of a jury.

An attempt to commit a crime is a common law misdemeanour and the court has, therefore, power to impose imprisonment at its discretion: *R.* v. *Morris* [1951] 1 K.B. 394. Where, however, statute prescribes a definite term of imprisonment as the maximum punishment for an offence, it is wrong for courts to impose any longer sentence on a person who is convicted only of an attempt to commit that offence: *R.* v. *Pearce* [1953] 1 Q.B. 30. A longer sentence than two years for a common law misdemeanour should only be imposed in serious cases or, if the misdemeanour charged is an attempt, when the accused is one who, if he had accomplished his purpose, would obviously have received a severe sentence: *R.* v. *Higgins* [1952] 1 K.B. 7.

SHOPS

Early closing days—mixed shop

Fine Fare, Ltd. v. Brighton Corporation

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Ashworth JJ.: January 28, 1959: *The Times*, January 29, 1959.[12]

The appellants were convicted by the Brighton Justices of four offences under various Brighton Weekly Half-Holiday Orders. These Orders were made under statutory provisions now embodied in section 1 (2) of the Shops Act, 1950, which provides that the local authority may fix the weekly half-holiday " for all shops, or may fix (*a*) different days for different classes of shops; . . ." The appellants carried on a number of trades and businesses at the same premises. In respect of the four principal businesses carried on by them, the Order required early closing on Wednesday; the appellants chose instead to close early on Thursday, the day prescribed in respect of the other trades and businesses.

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[12] For the appellants: *L. G. Scarman, Q.C.*, and *R. O. C. Stable* (instructed by Messrs. Royds, Rawstorne & Co.). For the respondents: *Roger Parker* (instructed by Messrs. Sharpe, Pritchard & Co. for the Town Clerk, Brighton).

The convictions were for failing to comply with the Orders requiring Wednesday closing.

Held, allowing the appeal, that the appellants were entitled to choose upon which of the two days they would close early; the Scottish decision of *Patrick Thomson Ltd.* v. *Somerville*, 1917 S.C.(J.) 3, which applied with force to the present case, had been decided before the re-enactment of the provisions in section 1 (2) of the Act. [D. C.].

Commentary. It would seem that where more than one class of business is carried on in a single shop, and an order has been made under section 1 (2) which is expressed to apply to some, but not all, of those classes of business, the order will not apply at all to the shop in question. The obligation, under section 1 (1), to close on one half-day in every week remains.

It was argued for the corporation that the proper construction was that each order should be held effective, not as regards the whole shop, but with respect to those counters in the shop at which the business named in the order was carried on. This construction, it was said, would produce a logical scheme and would prevent the unfairness and competition between traders which would otherwise ensue. Lord Parker C.J. pointed out that this was a penal provision and that there was no irresistible inference in favour of the corporation's construction. The courts commonly, though by no means always, resolve ambiguities in penal statutes in favour of the accused. The conclusive factor, however, was the existence of the Scottish decisions in *Patrick Thomson, Ltd.* v. *Somerville* (above) and *MacDonald* v. *Groundland*, 1923 S.C.(J.) 28 which established that the decision in the earlier case applied where the business, in respect of which the order had been made, was a substantial, and not merely a subsidiary, part of the whole business of the shop.

Scots decisions are not binding on English courts but the English courts consider it " most desirable wherever possible for the sake of uniformity of decisions under these statutes [*sc.*, statutes which apply to both England and Scotland] that we should follow the decision of the Scottish courts ": *Stone* v. *Boreham* [1958] 3 W.L.R. 209, 213, *per* Devlin J.; and *cf. Trickers (Confectioners) Ltd.* v. *Barnes* [1955] 1 W.L.R. 372, 379.

TRIAL

Summing-up—failure to put specific defences to the jury

R. v. Colletti and Oliva

Court of Criminal Appeal: Lord Parker C.J., Donovan and Ashworth JJ.: February 10, 1959: *The Times*, February 11, 1959.[13]

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[13] For the appellants: *Victor Durand, Q.C.* and *Clive Nicholls* (instructed by P. Rusk & Co.). For the Crown: *John Streeter* (instructed by N. K. Cooper, Esq., County Hall, Maidstone).

C. and O. were convicted at quarter sessions with two others of attempted store-breaking and larceny. The offence was committed when a kiosk at a garage was broken into and oil stolen. At the trial C. and O. admitted that they had stopped at the garage in their motor-car and said that was for the purpose of filling the radiator with water. C. said that he had gone round to the back of the building to find a lavatory and that he could see nothing from there of what was happening. O., who was tried separately, said that he never saw anyone tampering with the kiosk or the oil cabinet and was no party to it. C. and O. appealed to the Court of Criminal Appeal on the main ground that their defences were not put to the jury.

Held, allowing the appeals, that C.'s defence was put in this form: " . . . his case is 'I never touched anything and I did not see anybody else touch anything.' " But C.'s specific defence was that he had been behind the building and knew nothing of what was happening. The details of that defence were never put. Neither was the specific defence of O. ever put to the jury. No doubt the jury had heard the speeches of counsel and knew full well what the defence was, but it seemed to this court important that in every case, however simple, the details of the defence of each specific person should be put; and that was all the more important where the accused, as here, was tried with other persons.

Further, in O.'s case, it was said that there was no sufficient direction to the jury as to the nature of a joint enterprise. The nearest to a direction that the case against each of the accused had to be considered separately was in the words: "You have got to make up your minds whether it was these people acting in concert together who tried to break into the kiosk. You have got to make up your minds that it was these people acting in concert, or one or other of them, who took the oil, if you are satisfied the oil was taken." This court thought that it would be unsafe to allow the convictions to stand and, accordingly, both convictions would be quashed. [H. P.]

Commentary. It is a "paramount principle" of our criminal law "that when a defence, however weak it may be, has been raised by a person charged, it should be fairly put before the jury": *R.* v. *Dinnick* (1909) 3 Cr.App.R. 77. *Cf. R.* v. *Lankford* [1959] Crim.L.R. 209.

If the parties had been acting in concert and one of them had stolen the oil, it would have been immaterial that it was impossible to prove which was the thief, for the other would have been guilty of aiding and abetting: *R.* v. *Swindall and Osborne* (1846) 2 C. & K. 230. But if there was no evidence that they were acting in concert and it was impossible to prove which was the thief, both would have to be acquitted: *R.* v. *Richardson* (1785) 1 Leach 387.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Imprisonment

In R. *v*. PARR the court (Lord Parker C.J., Donovan and Hinchcliffe JJ.: February 16, 1959) reduced a sentence of two years' imprisonment to one of nine months' imprisonment on the ground that the sentence was out of proportion to the offence. P. had pleaded guilty at quarter sessions to stealing a set of dominoes after a visit to a public house with another man (when they left they took the dominoes with them). P., who was a man of twenty-three years of age, had been on probation for larceny, fined for larceny, sent to borstal training for shop-breaking and fined again for larceny. The court stated that it entirely agreed with the view of quarter sessions that P. wanted "a sharp lesson," but it did seem that the sentence of two years' imprisonment was altogether out of proportion. Accordingly a sentence of nine months' imprisonment could be substituted.

In R. *v*. RIDDOCH the court (Lord Parker C.J., Donovan and Hinchcliffe JJ.: February 16, 1959) reduced a sentence of ten years' imprisonment (seven, two and one years consecutive) to one of seven years' imprisonment. R. had pleaded guilty at assizes to one offence of buggery with a boy (R.'s step-son) and to two offences of indecent assault on young girls (R.'s step-daughter and daughter). R., who was a man of thirty-eight years of age, had no previous convictions. The court stated that these were serious offences and were not apparently just isolated instances but a definite course of conduct. However, on the whole the court thought that ten years in all was too much and, accordingly, the sentence would be varied to one of seven years in all, *i.e*., seven, two and one years concurrent.

In R. *v*. SCAIFE (reported *ante*, p. 295) a sentence of eight years' preventive detention for attempted office-breaking and attempted larceny was varied to one of five years' imprisonment. The court held that S. was not eligible for preventive detention when sentenced, by reason of a technical defect in the notice of previous convictions required by section 23 of the Criminal Justice Act,

1948. S., who was a man of forty-eight years of age, had numerous previous convictions, including fourteen sentences of imprisonment and one of preventive detention since 1938. The court further stated that as the offence was only an attempt it would be quite impossible and wrong to substitute a term of imprisonment which was greater than that which could be given for the substantive offence. Accordingly, a sentence of five years' imprisonment would be substituted for the sentence of preventive detention.

In R. *v*. CRONE the court (Lord Parker C.J., McNair and Hinchcliffe JJ.: February 23, 1959) varied a sentence of borstal training to one of imprisonment for twelve months. C. had pleaded guilty at a magistrates' court to two cases of receiving and one of larceny and was sentenced by quarter sessions, seven other offences being taken into consideration. C., who was a young man of twenty years of age, had no previous convictions. The court stated that the only doubt it had in regard to the sentence was that C. was only just under twenty-one and the prison Commissioners had reported that he was not entirely unsuitable for borstal training but they were unhopeful of success. In those circumstances a sentence of imprisonment for twelve months would be substituted for the sentence of borstal training.

Preventive detention

In R. *v*. MOODY the court (Lord Parker C.J., Donovan and Ashworth JJ.: February 10, 1959) reduced a sentence of seven years' preventive detention to one of five years' imprisonment. M. had pleaded guilty at quarter sessions to housebreaking. M., who was a man of thirty years of age, had nine previous convictions mostly for housebreaking and since 1948 had been almost continuously in prison. Recently he had been sentenced to three years' imprisonment for housebreaking in 1953 and to four years' imprisonment for larceny in a dwelling-house in 1955. He was last released from prison in September, 1958, just before he committed the present offence. The court stated that it felt it could be a little more lenient than otherwise it would having regard to M.'s age, because he only just qualified for preventive detention. Accordingly a sentence of five years' imprisonment could be substituted for the sentence of preventive detention, with an order under section 22 of the Criminal Justice Act, 1948.

Corrective training

In R. *v*. WEST the court (Lord Parker C.J., Donovan and Hinchcliffe JJ.: February 16, 1959) varied a sentence of three years' corrective training to one of eighteen months' imprisonment. W. had pleaded guilty at quarter sessions to four offences of fraudulent conversion, one of forgery and one of uttering a forged document (two other offences being taken into consideration. W., who was a man of twenty-three years of age, had two previous convictions. At quarter sessions sentence had originally been postponed for six months. The court stated that they had said over and over again that sentences ought not to be postponed. If a man was thought fit to be put on probation, he ought to be put on probation; if not, he ought to be sentenced there and then. It was highly objectionable to postpone sentence. Not only was the method of dealing with the case quite wrong but also this was not a case for corrective training. Accordingly a sentence of eighteen months' imprisonment would be substituted for the sentence of three years' corrective training.

Detention

In R. *v.* COOPER the court (Lord Parker C.J., Donovan and Hinchcliffe JJ.: February 16, 1959) substituted a sentence of detention in a detention centre for one of borstal training. C. had pleaded guilty at assizes to assault occasioning actual bodily harm; the assault being committed, with others, on a police officer outside a public house. C., who was a young man of eighteen years of age, had no previous convictions. The court stated that the offence itself was a serious one, the police officer having been hit, kicked and punched in the face. But C. had no previous convictions and came from a respectable family; he had been in regular employment and there was little doubt that the offence was due to his association with undesirable persons. In the circumstances a sentence of borstal training was not appropriate and what was required was a short, sharp punishment. The proper sentence was one of detention in a detention centre for three months and, accordingly, that sentence would be substituted for the sentence of borstal training.

In R. *v.* DEAN, CHARNOCK and JOYNT the court (Lord Parker C.J., McNair and Hinchcliffe JJ.: February 23, 1959) substituted sentences of detention in a detention centre for borstal training. D., C. and J. had pleaded guilty at quarter sessions to store-breaking and in each case other cases were taken into consideration. D. and J. were young men of sixteen years of age, C. was seventeen years of age; all three were of previous good character. The court stated that, although the offences were serious, it seemed to the court that, having regard to their previous good character, the appellants were not yet confirmed in criminal tendencies and that borstal training might not be very suitable. Possibly the best thing for them would be to have a short, sharp punishment under severe discipline such as was provided in detention centres. Accordingly, a sentence of detention for three months in a detention centre would in each case be substituted for the sentence of borstal training.

Conditional discharge

In R. *v.* FOLEY the court (Lord Parker C.J., Donovan and Ashworth JJ.: February 2, 1959) varied a sentence of borstal training to a conditional discharge. The sentence of borstal training had been passed by quarter sessions in respect of offences of office-breaking. At the time of these offences F. was on leave from an approved school and, according to him, he went to the police and confessed to the offences because he did not like that school and he wanted to lead an honest life. The court stated that quarter sessions would clearly have sent F. back to an approved school but, as he was then over seventeen years of age, a fresh order could not be made. However, it would be possible to attain that end by giving F. a conditional discharge and then handing him back to an approved school. Accordingly F. would be discharged on condition that he was of good behaviour for twelve months and, as the original sentence to an approved school still stood, he would be handed over to the appropriate authority.

Acts and Orders *

Animals

Various areas are declared to be Eradication Areas for purposes connected with the control of tuberculosis as from March 1, 1959, and accordingly, as from that date, these areas became subject to the provisions of the Tuberculosis (Area Eradication) Order, 1950 (S.I. 1950, No. 2006, as amended by S.I. 1954, No. 762). These provisions include amongst other things a prohibition against movement of cattle into such an area except under licence or on certain transit journeys. The Orders are made under section 5 of the Diseases of Animals Act, 1950, by which the Minister of Agriculture, Fisheries and Food is empowered to declare to be Eradication Areas any areas in which he is already satisfied that a substantial majority of the cattle therein are free from any particular disease. All the Orders are operative March 1, 1959. TUBERCULOSIS (NORTH-EAST SCOTLAND ERADICATION AREA) ORDER, 1959 (S.I. No. 234) (3d.); (CORNWALL AND WEST DEVON ERADICATION AREA) (S.I. No. 236) (3d.); (DURHAM AND YORKSHIRE ERADICATION AREA) (S.I. No. 237) (3d.); (NORTH EAST AND SOUTH EAST WALES AND MONMOUTHSHIRE ERADICATION AREA) (S.I. No. 238) (3d.); (WEST AND SOUTH MIDLAND AND EASTERN COUNTIES ERADICATION AREA) (S.I. No. 239) (3d.).

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* Prepared by F. Maurice Drake, *Barrister-at-Law*.

For penalties for contraventions see section 7 of the Diseases of Animals Act, 1950.

November 2, 1959, is appointed as the earliest day by which local authorities shall submit to the Minister of Agriculture, Fisheries and Food their reports on slaughterhouse facilities, as required by section 3 of the Slaughterhouses Act, 1958 (6 & 7 Eliz. 2, c. 70). Under the provisions of the Act reports must be submitted not later than twelve months after the appointed day (except where a longer period is allowed by the Minister in any particular case). SLAUGHTERHOUSE REPORTS (APPOINTED DAY) ORDER, 1959 (S.I. No. 172) (2d.).

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 196 (Beaconsfield) (2d.); 197 (Deptford) (2d.).

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of readers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

55. *Notifying change of ownership of motor-vehicle — whether continuing offence?*

Recently a query has arisen as a result of an offence committed with regard to the owner of a motor-vehicle failing to notify change of ownership to the taxation authorities in accordance with regulation 9 of the Road Vehicles (Registration and Licensing) Regulations, 1955.

The owner purchased the vehicle seven months ago and failed to notify at the time. This matter was not discovered until recently when the vehicle was being used on the highway.

The question that has arisen in consequence of this position is whether proceedings can be taken in view of the limitation of time of six months as laid down by the Magistrates' Courts Act, 1952, s. 104.

I am of the opinion that the offence was still being committed at the time the owner was stopped, as the offence of failing to notify being a continuing offence and the limitation for proceedings should, therefore, count from the time it was discovered. However, there is a second opinion that as the above-mentioned regulation requires the owner to notify forthwith the taxation authorities, the offence is not a continuing one and the time limit counts from the date he acquires the vehicle.

I would be obliged for your opinion in the matter and have in mind the case of *Rowley* v. *Everton* (*T. A.*) *& Sons Ltd.* Are there any later cases relative to this question of limitation of time ?

[J. A. B.]

Answer

This is a highly arguable point and in the absence of any direct authority or decision it is impossible to give an absolutely definite answer one way or the other ; and there are objections which can be raised to either possible interpretation.

First, the wording of the Regulations, which requires a change of ownership to be notified " forthwith " raises the question " what is the meaning of ' forthwith ' ? " Here I think the answer must be " within a time which in all the circumstances of the case is reasonable "—in the absence of anything unusual 14 days might be considered a reasonable time.

Secondly, the wording of section 104 of the Magistrates' Court Act, 1952, seems to suggest that the six months' time limit runs either from the date of the commission of the offence *or* from the date the offence was discovered. The notes to Stone's *Justices Manual* also suggest this interpretation. Yet this interpretation would have been relevant in *Rowley* v. *Everton* [1941] 1 K.B. 86 and does not seem to have been discussed there.

Although I have some doubts on the matter it is my opinion that this *is* a continuing offence, and, accordingly, I think the owner could still be prosecuted. This view is strengthened by the further requirement in Regulation 10 of the Road Vehicles (Registration and Licensing) Regulations, 1955, which provides that the owner shall, forthwith, deliver up the Registration Book to the Council by whom the vehicle is registered. It seems to me that the exact converse of delivering up the log-book is for the owner to retain it ; and that in retaining it he is clearly committing a continuing offence.

[M. D.]

Letters to the Editor

R. v. Ayu

Sir,

In your commentary at [1959] Crim.L.R. 58 you say "It is now made clear that it is not 'open for any kind of condition to be inserted according to the whim of the judge or magistrate' in a recognisance to keep the peace or be of good behaviour . . . and the law that a breach of recognisance can be enforced only by a forfeiture of the sum in which the recognisor is bound over (though imprisonment may be imposed in default) remains undisturbed."

I am unable to reconcile this opinion with the decision in *R.* v. *Sharp and Another* [1957] 1 Q.B. 552. The recognisance in this case I thought was a recognisance to keep the peace and be of good behaviour. Am I wrong in this? I would appreciate your comments and clarification.

Yours very truly,

C. C. SAVAGE, Q.C.

London, Canada.

[Professor J. C. Smith writes: "The opinion expressed in my commentary is indeed irreconcilable with *R.* v. *Sharp.* That case cannot be explained, as *McCartan's* case was in *Ayu*, as being one of binding over to come up for sentence and to keep the peace in the meantime, for Sharp's conviction was quashed before he was ordered to enter into recognisances. The court said, 'We order each of them to enter into a recognisance and to give a surety in the sum of £50 to keep the peace and to be of good behaviour for twelve months, and in default to go to prison for six months.' This might reasonably be taken to mean that six months' imprisonment would be imposed if Sharp failed to find sureties or refused to be bound over, which would be perfectly regular —see *R.* v. *Truman* [1913] 3 K.B. 164.

Unfortunately, however, the report of the subsequent proceedings in *The Times* for July 2, 1957, makes it clear that this was not what was intended. It there appears that Sharp did find sureties yet, having been convicted of offences under the Road Traffic Acts, he was sentenced to six months' imprisonment for breach of recognisance and the sureties were forfeited. It seems clear that *R.* v. *Sharp* (*The Times*, July 2, 1957) stands as an authority for a remarkable—and, it is submitted, undesirable—extension of the law."]

Books and Periodicals

Book Reviews

Psychiatry and the Criminal. By John M. Macdonald, M.D. Springfield, Illinois: Charles C. Thomas. 1958. 213 and (index) 12 pp. (£2 2s. net.)

This is a most valuable book, it is pleasant to read and is packed with practical and informative material. A junior colleague was recently called upon to give advice in a subtle and difficult case. This involved misuse of public funds and the outcome was of singular importance to the accused. On your reviewer's recommendation the form of presentation as set out by Professor Macdonald was followed exactly. To the psychiatrist the case was the action of a sick man but his legal advisers were for various reasons unhopeful. It was a great pleasure to the young psychiatrist to find that not only was justice done, and seen to be done, but in the light of his report all involved strove to see that the accused was helped, *i.e.*, he was unconditionally discharged on the understanding that treatment was forthcoming. This is mentioned at length because it stresses the practical and useful nature of this work. At the same time from the psychiatric viewpoint the volume did not assist much in elucidating the psychopathology of the crime, and further search showed that stealing, for instance, is not mentioned in the index, and kleptomania qualifies for but two almost indirect references in the text. One feels that space could profitably be given to more detailed examination of less serious crime, *i.e.*, those committed by individuals in a state of unrecognised incipient dementia, the so common adolescent thieving, etc.

The irresistible impulse is discussed in three sections, but it is well to remember that this plea is not readily accepted in this country (your reviewer has more than once been needlessly warned by legal friends about the effect of making this plea).

The author has given us a most interesting discussion upon the ethical problems involved in confessions made either involuntarily under narcosis or in the therapeutic situation. He rightly holds the view that confessions are privileged communications. It should perhaps be mentioned that one solution of the contrasting viewpoints set out is that in the light of greater self knowledge patients have been known to voluntarily make restitution through the proper authorities.

The chapters dealing with Juvenile Delinquencies are most valuable and one can profitably follow the author's advice in chapter three on Eissler's experience with delinquents.

The origins of criminal behaviour are well and clearly set out but are described entirely in Freudian terms. Jung is not mentioned, but indeed Jung's concepts have much to offer in the elucidation of criminal behaviour. For instance his discovery that the juvenile may be living out the unlived part of the parents life, sexual disturbances may be influenced by anima possession, etc. Personality types, neglect of the inferior function or other Jungian ideas provide much insight into the apparently motiveless crime.

These criticisms are but indications of personal interests and requirements.

This book should prove of the greatest value and interest not only to the tyro but to all psychiatrists who appear in court and to the far greater number who are called upon to make reports which may never be tested in law.

The formulation of the report and the advice regarding court appearances are robust, encouraging and authoritative. The volume should, therefore, be in every psychiatrist's library and should be read by every lawyer.

It is enlivened by apt and erudite quotations, has liberal bibliographies, and like all thoroughbreds from the Charles C. Thomas stable it is pleasant to handle and beautifully printed.

A. G.

The Society of Captives: A Study of a Maximum Security Prison. By Gresham M. Sykes. Princeton University Press; London: Oxford University Press. 144 pp. (30s. net.)

This is a sociological study made with laudable objectivity and descriptive force. Professor Sykes' work is based on his observation that the maximum security prison is an attempt to create and maintain total, or almost total social control. He postulates that prison life forms a definite genus of sociological phenomena. Accepting this, and it appears to be true, this study can be read with profit by all who are interested in the dynamics of custodial life, and of totalitarianism in any form. It is clear too that the observations in this work can be stimulating and enlightening to those who have to do with institutions having a bureaucratic structure. The subversion of power, the distortions that occur in the working out of complex interrelationships are clearly presented. So too is the effect brought about where the imposition of authority depends upon those of inferior status who have a close emotional stake in the environment. The sociological situation which emerges is shown to be a finely balanced power system. One might say it is almost a social model of individual psychic life with its constant fluid flow and feed back between conscious and unconscious. The very objectivity of this book, dealing with an emotionally charged topic makes it rather slow going at first but it rapidly grows in depth and intensity. There is a great richness of factual information regarding the interplay of forces between captive and custodian. Those unfamiliar with prison life will learn that matters are much more complex, fluid and dynamic than at first appears.

It is most interestingly shown that the guard in a maximum security prison is as much a prisoner as the captive.

Your reviewer asked an individual with much experience as a captive, in this country how Professor Sykes' account compared with his extensive first-hand knowledge. He confirmed the basic similarity from the prisoner's view-point. He also made the observation that the sociological life of the captive would be very different indeed in its dynamics if tobacco were freely available. He affirmed that in scarcity it assumed an importance quite unknown " outside."

This book is admirably objective but happily it is illuminated in places by the author's personal viewpoints. He shows the dangers created by the bureaucratic personality in the role of custodian and makes one feel that the creation of criminal behaviour by the pressures of prison life throws responsibility upon us all.

In the seven chapter in this volume there are two that are particularly outstanding, The Regime of the Custodian and The Pains of Imprisonment. In the latter the study of the psychological onslaught upon the prisoner's ego image by deprivation of liberty, goods, services, heterosexuality, autonomy and security make a striking contribution to our understanding of deep and powerful forces.

This enjoyable and valuable work would be enhanced by the inclusion of more explicit studies of the emotional forces as such but the Professor has been at pains to avoid subjectivity, so one cannot grumble.

This is a book to be commended to all those interested in human relations and finally it has numerous footnote references which point the way to further reading. A. G.

Books received:

The High Court of Chivalry. By G. D. Squibb, Q.C. Clarendon Press; Oxford University Press. 1959. xxiv, 277 and (Bibliography and index) 26 pp. (42s. net.)

The Trial of Peter Manuel. By John Gray Wilson. London: Martin Secker and Warburg. 1959. 238 pp. (21s. net.)

Settled Out of Court. By Henry Cecil. London: Michael Joseph. 1959. 190 pp. (13s. 6d. net.)

Readers' digest

Affray: 227 *Law Times* 76.

Bail: Some general principles: 25 *The Magistrate* 15.

Criminology: The nature and scope of criminology: 32 *Police Journal* 7.

Juvenile delinquency: Young delinquents and the law: 103 *Solicitors' Journal* 106.

Public mischief: 67 *Police Review* 116.

Road traffic: Notice of intended prosecution: 67 *Police Review* 138.

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Books for review should be sent to the Publishers at the above address.

THE
CRIMINAL LAW
REVIEW

May 1959

The Thurso Inquiry

The tribunal set up to investigate an allegation that John Waters, a Thurso boy, was assaulted by two policemen has now reported (Cmnd. 718).

Briefly, the report states that Waters insulted the policemen so that one of them, Gunn, himself only 22, struck the boy. Policemen must control their tempers, and, as the report states, " what [Gunn] did was, for a policeman, unquestionably wrong."

The Tribunals of Inquiry (Evidence) Act, 1921, has undoubtedly been used as a sledgehammer to crack a nut. Whilst the decision not to prosecute the policeman was a lawyer's decision and, with respect, the right one, subsequent decisions were political and not always quite so right. However that may be, it seems unnecessary to bring into operation a cumbersome and expensive machinery to decide a matter which in England would have been settled by a private prosecution or a civil action for damages.

The state of crime in Britain

The state of crime in Britain was the subject of an eight-hour debate in the House of Lords on April 8.[1]

Lord Nathan announced a gift of £150,000 to the Institute of Criminology by the Isaac Wolfson Foundation for the foundation of a Chair and a Readership in Criminology at Cambridge and also, perhaps, for founding a library of criminological works.

Mention should also be made of Lord Pakenham's comments on the after-care of prisoners, Lord Birkett's remarks on compensation for victims of crime, Lord Denning's remarks on indeterminate sentences, Lord Winster's speech on the relationship of crime and sin and Lord Chorley's mention of the probation service.

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[1] H.L. Debates, Vol. 215, cols. 399 *et seq.*

Providing for a speedy trial

The case of *R.* v. *Campbell*, reported at p. 362, *post*, reveals an anomaly in the provisions of the criminal law for the speedy trial of persons committed to Assizes. The provisions of the Habeas Corpus Act, 1679, s. 6, apply only where the terms of the Act have been strictly complied with. In *R.* v. *Campbell* Judge Laski said: "It may be that it is in terms of today difficult if not impossible to comply with the requirements of the statute." With this statement we respectfully agree. The Assizes Relief Act, 1889, provides only for the speedy trial of persons committed to quarter sessions. Thus, the only remedy for a person awaiting trial at Assizes lies with the court's discretion to decide the future of a case. This is clearly unsatisfactory.

Contempt of court

The chaotic state of the law of contempt of court has recently been the subject of a Report by *Justice*,[2] the British Section of the International Commission of Jurists. The Committee of *Justice* which considered the question concluded that the law of criminal contempt is a serious handicap to free discussion: the urgent need, it is suggested, is a right of appeal so that, first, a substantive body of law of criminal contempt can be built up.

> "The need, we consider, is particularly urgent because the present state of the law tends particularly to impede free discussion in those newspapers and other organs of public opinion which are most responsible, while others tend to treat the law of contempt less seriously. The practical result of this is to discourage discussion where it is most desirable and effective and to put a premium on contempt elsewhere: The value to a newspaper of news is much enhanced when others feel precluded from publishing it."

We feel that a law which leads to this highly undesirable state of affairs is much in need of reform. It is hoped that the considerable amount of research which has been carried out by the Committee of *Justice*, and the recommendations which they have made for the reform of the law and procedure relating to contempt of court, will not pass unnoticed. Meanwhile, we recommend the Report to our readers.

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[2] *Contempt of Court*, Stevens & Sons. 5s. net.

Disqualifications from driving

The power of a court to disqualify from driving is of great value in cases where the offending motorist is irresponsible or positively dangerous in his use of the roads. But disqualification from driving is not a punishment to be meted out for trivial, and even inadvertent, breaches of the traffic laws. This comment is prompted by a report in the *Scottish Daily Express* of a number of cases in Ayr where disqualifications from driving were imposed in the following cases:

A man, who, incidentally, relies on his driving licence for his livelihood, but forgot to renew it while in hospital;

Allowing an employee to drive a car the steering of which was deemed by the police to be faulty;

A learner driver who was caught testing his brakes, which had been adjusted, unaccompanied by a qualified driver and not showing L-plates;

A man who, warned that his car's steering was faulty, immediately put the vehicle off the road and purchased a new one.

To impose the serious penalty of disqualification for minor offences of this nature is debasing the currency; hanging did not prevent sheep stealing. Perhaps the answer is that suggested in the April issue of *Motor Sport*: keep clear of Ayr.

Vehicles kept on roads

The recent Budget includes a proposal that vehicle excise duty shall be chargeable in respect of the keeping, as well as the use, of mechanically propelled vehicles on roads.

The Chancellor of the Exchequer, Mr. Derick Heathcoat Amory, said that some people have developed the " bad habit " of leaving their vehicles unlicensed on the highway, and that this ought to be stopped.

Certainly this proposal should do much to remove the present menace of cars whose principal function, it appears, is to remain in the road perpetually being taken to pieces and put together again by their owners. Not only will the owners of these vehicles have to pay vehicle excise duty but, under the provisions of the Motor Vehicles (Third Party Risks) Regulations, 1941, reg. 11, applications for a licence must be supported by the production of a certificate indicating that, at the time when the licence comes into operation, there will be in force a policy of insurance relating to the user of the applicant or other persons on his order or with his permission.

The expense involved may encourage people to keep their vehicles off the roads if they are not going to use them, quite apart from the risk of prosecution under section 35 of the Road Traffic Act, 1930.

Treatment of young offenders

The Advisory Council on the Treatment of Offenders has appointed a sub-committee, under the Chairmanship of Mr. Justice Barry, to consider in greater detail the Prison Commissioners' proposals for changes in the existing methods of treatment for young offenders. The Council has already given general approval to the proposals, which were outlined in the White Paper, " Penal Practice in a Changing Society." [3]

Anyone wishing to submit evidence for the consideration of the sub-committee should send it to the Secretary, Mr. E. R. Colwyn, at the Home Office, Whitehall, London, S.W.1.

Judicial appointments

Mr. A. P. Marshall, Q.C, Mr. H. J. Phillimore, O.B.E., Q.C., and Mr. C. R. N. Winn, C.B., O.B.E., have been appointed judges of the High Court of Justice. Mr. Marshall and Mr. Phillimore being assigned to the Probate, Divorce and Admiralty Division and Mr. Winn to the Queen's Bench Division.

Mr. Justice Davies has been transferred from the Probate, Divorce and Admiralty Division to the Queen's Bench Division.

Central Criminal Court: appointments

The Attorney-General has made the following appointments at the Central Criminal Court:

Mr. M. J. H. Turner to be First Senior Prosecuting Counsel to the Crown.

Mr. J. M. G. Griffith-Jones to be Second Senior Prosecuting Counsel.

Mr. E. J. P. Cussen to be Third Senior Prosecuting Counsel.

Mr. J. H. Buzzard to be First Junior Prosecuting Counsel.

Mr. S. A. Morton to be Second Junior Prosecuting Counsel.

Mr. J. C. Mathew to be Third Junior Prosecuting Counsel.

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[3] Cmnd. 645.

Proposals to Improve the Perpetuation of Testimony

By Glanville Williams, LL.D., *Barrister-at-Law*

It was suggested in a previous article[1] that more use should be made of the Crown witnesses' proofs of evidence. It is now to be submitted that the proof of evidence should itself be regarded as having some evidentiary value, with a probative force depending on the circumstances. The fact that a witness has since forgotten the facts originally related to the police is a matter of legitimate comment for the defence, but it may not be fatal to the credibility of the evidence—if, for example, details are given which fit in with what is otherwise known of the circumstances.

If the proof of evidence thus attained legal status, it would become more desirable than ever that the evidence when originally taken should be as accurate as possible. At present our process of taking evidence sometimes leads, perhaps involuntarily, to the perversion of truth. When the prosecution witness is first interviewed by the police, he will be allowed in the first instance to tell his story so far as possible in his own way, but almost every witness needs to be asked some questions, and some witnesses need to have most of the facts drawn from them in this way. When the statement is elicited in answer to questions the nature of these questions may greatly affect the response that the witness makes. It is not only that the questions may edit the evidence; they may have the more serious effect of acting on the witness by suggestion. The questioning sometimes affects the witness's own impression of what he saw, and thus perpetuates itself in the witness's later evidence. There is particular danger of this where the witness is anxious to assist the police, either to give himself a sense of importance or from a genuine sense of social duty.

Obviously, there can be little hope that the court of trial will be able to appraise the effect that police questioning may have had unless that court is provided not only with the witness's statement to the police but with a note of the questions that elicited the statement. At present, however, no separate note is taken of the questions, and the witness's statement appears as a continuous narrative.

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[1] [1959] Crim.L.R. 82.

This is so even when it is intended to put the statement in evidence under one of the exceptions to the hearsay rule, *e.g.*, when it is a confession by the accused person.

Recording witness's statement

How can this situation be improved? Obviously, the police officer who interviews the witness should be carefully trained for his work and chosen for his competence in performing it. So far as possible the witness's recital should be spontaneous, but the officer may be permitted to use non-leading questions when necessary; only in the last resort should leading questions be asked. The whole interview should be tape recorded and a copy made available to the defence. The development of tape and wire recorders has now reached a point where much greater use should be made of them in the administration of justice. Pocket models are available, and they should become as ubiquitous, almost, as the policeman's notebook.

The technique would be of great assistance to the police in proving their case. It is quite common for a criminal to confess to the police, but then, at the trial, to recant and to allege that the confession was a fabrication, or else was procured by unfair interrogation. A recording of the confession as it was given would make this line of defence more difficult. It is true that a defendant who wished to deny his confession might still allege that the tape had been tampered with. But it is probable that little credence would normally be given to this allegation, and in any case steps could be taken both to protect the police from such a charge and to protect the accused from all risk of interference with the record. Immediately after the interview, the tape might be sealed in an envelope, and the witness asked to authenticate the seal with his signature. The sealed tape might then be taken before some public officer of standing, such as the clerk of the court.[2] It might be possible to develop recording machines which would produce two recorded tapes at the same time, one being filed in this way and the other retained for the use of the police in preparing the case. Alternatively, the tape recordings filed with the clerk of the court might have copies taken from them under the clerk's auspices. In any case, counsel for the defendant should have the same right of access to the recordings as he has to the other evidence for the prosecution. The system would not, of course, prevent the accused from alleging that the statement had been extorted by a threat made before the recording commenced, or while the machine was stopped.

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[2] I am indebted for this suggestion to Mr. B. N. Bebbington, O.B.E., Chief Constable of Cambridge.

The only serious difficulty that I can imagine as likely to arise is that some witnesses might object to their statements being tape recorded. In such circumstances the recording might have to be waived, though one would hope that in time it would become so familiar a part of procedure that objections would disappear. One American Force has, indeed, gone even beyond the present suggestion. Professor Schroeder, Jnr., Director of the Law-Medicine Centre in Cleveland, Ohio, recently showed in London to a medico-legal audience a sound film taken by the Cleveland police of three criminals' confessions to a bank robbery. The film placed the authenticity of the three confessions beyond all doubt, since it was possible to perceive their complete spontaneity, notwithstanding a measure of prompting by questions from the police officer who interviewed the suspects. The visual film, which recorded the demeanour of the three suspects, was a revealing addition to the sound-track.

Advantages

An incidental advantage of the system of tape recording witnesses' statements would be that the increased credibility of the statement so recorded might make it a partial safeguard against the witness being subsequently "got at" and flagrantly resiling from his evidence when the case comes to trial. Thus the existence of the evidence on tape might form some kind of substitute for the present deposition, and so might assist in the disappearance of the preliminary hearing.

Another considerable advantage of this system is that it would for the first time give the accused protection from surprise in summary proceedings. At present, the prosecution does not have to disclose its evidence in advance of a summary trial, even though the result of such a trial may be of grave moment to the accused person. The accused may have no information what the witnesses for the prosecution are going to say, and his advocate, if he has one, may have nothing to go on save the account of the incident given by the accused. This may not be a great misfortune to a guilty man, since he will presumably have a good idea of what in fact happened. It is only the innocent who stands to be taken completely by surprise at the nature of the evidence against him. Now the only way to achieve disclosure of evidence before a summary trial is to require the prosecution to furnish the defendant with copies of the statements made by its witnesses. But, for reasons already stated,[3] the police are reluctant to disclose the identity of their witnesses before the evidence has been formally recorded; and even when they will give a list of their witnesses, they will not supply a proof of the evidence. The existence of a sealed tape recording of the evidence might help to overcome the objection.

Traditionalists will object that the recorded police interview cannot be allowed probative force because it is conducted in the absence of the accused person and without the possibility of cross-examination by him. In my view, too much is made of this objection. As I have said before, I do not deny the importance of cross-examination, for which opportunity must be given. But the accused has this opportunity when the witness is called at the trial. There can surely be no rational objection to looking at the witness's earliest statement, for what it is worth, in the light of the cross-examination to which he is later subjected at the trial.

In the same way the police somewhat captiously refuse to disclose to the accused the proof of evidence of a witness whom they do not propose to call at the trial. It sometimes happens that a witness is interviewed by the police, but his evidence is thought not to be helpful and it is decided not to call him. In such circumstances the police will supply the accused with the name and address of the witness, but not with a copy of his statement. Occasionally, the evidence is of great value to the defence, but the defending lawyer finds it impossible to get the witness to make the statement to him that he has made to the police. Surely justice demands that the statement should be put at the disposal of the defence.

Prosecuting Officer

By CHRISTOPHER WILLIAMS

Post Mortem

"Well, now, Newman," said Superintendent Portly, waving a plump hand towards the chair on the other side of his desk. "Tell me how you've got on this morning."

Newman sat down, placing the file of papers on the desk before him. He looked far from pleased with himself.

"The two traffic cases went off all right, both of them pleaded guilty by letter. The James case was chucked out."

"Do you mean they dismissed the case?" asked Portly.

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[3] [1959] Crim.L.R. 94.

"Yes, sir," replied Newman. "I can't think why. It was all there, and I thought I'd got it out all right."

"Maybe you did, Newman," said Portly. "But it was never a very strong case, you know. He'd never used the chain, nor looked like using it."

"All the same, sir," replied the Inspector, "the evidence, such as it was, was clear, and they ought to have convicted. I think there should be an appeal, sir," he went on with some heat.

"Here, hang on a minute, Newman," said Portly. "Not so fast. You can't appeal just because you don't agree with the court's decision. In the first place, you've got to have grounds for appeal. It would have to be on a point of law, or at any rate mixed law and fact. And even then the Chief's got some pretty firm views on appealing from the magistrates—there'd have to be a good reason to make it worth while. It would never do to appeal on every possible occasion. But suppose you tell me just what happened, and why they dismissed the case."

"Well, sir, it's rather hard to say exactly why they did. At the end of the case they retired for about ten minutes. They never sent for the Clerk. Then they came back, and the Chairman said something about James being a very silly fellow to go into snack bars and cause trouble, but that that wasn't what he'd been charged with; they realised he'd never used the chain, and they were inclined to accept his explanation for having it on him, although he might have saved himself and us a lot of trouble if he'd had the sense to tell the police about it at the time—case dismissed, with a warning to James to steer clear of Smallport in future. I ask you, sir, would it have made a ha'porth of difference if he'd told that yarn at the time he was arrested?"

"Annoying, I agree," replied Portly, stroking his chin with a judicial air. "But there you are—a question of fact; no grounds for an appeal. I mean, you charged him with having the chain without lawful authority or reasonable excuse. The onus passed to him to provide one. He offered them his explanation, whatever it was, and then they had to choose between accepting it as a fact or rejecting it. No doubt you and I, who know our hooligans, would know better than to accept his story; but they don't, and were entitled to accept his story. By the way, what was it?"

Newman described the explanation offered to the court, and the cross-examination that followed, in scornful tones.

"Pretty thin, I agree," said Portly. "But I don't see that there is anything to be done about it. Now, I was wondering whether they might have had difficulty in accepting the snack bar as a public place. If they'd thrown it out on those grounds, we *might* have thought about asking for a case to be stated."

"I don't quite see the difference, I'm afraid, sir," queried Newman. "I mean, whether or not he was in a snack bar at the time is just as much a question of fact as whether his story was true, surely."

"Well, yes, in a way," replied Portly. "But the point is that the section actually defines public place, and says that it includes a place to which the public have access. It would be a question of fact whether or not the public had access to the snack bar at the material time, but once you have shown that, then it follows as a matter of law that the snack bar is a public place for the purposes of the Act. If the court accepted your evidence of access by the public, but nevertheless held that it was not a public place because, say, the proprietor claimed the right to turn anyone out at any time, then you would have grounds for an appeal on a point of law. However, that's rather beside the point. What matters is that the magistrates accepted James's story, even though you know it is untrue, and even though James, when you asked him in cross-examination, failed to explain how he came to put the chain in his best suit. After all, they weren't to know about his previous conviction six months ago in Dalesford for the same sort of thing."

"Yes, that's another thing, sir," broke in Newman indignantly. "Previous conviction too! In the Dalesford case, it was a bit of gas pipe, but the story was the same—picked it up at work, and was taking it to his employer's yard. How do you think I could have worked that in, sir?"

"I don't know about working it in, as you call it, Newman," replied Portly sternly. "You've got to watch that sort of thing pretty carefully. James was not charged with repeating some previous offence, you know. He was charged with having a chain at the Follies Snack Bar last Saturday. I've already told you that all evidence must be both relevant and admissible. So evidence of his previous conviction would have to be relevant and admissible before you can give it." He held up his hand as Newman began to speak. "Not now—I haven't got time; but I can spare you half an hour this afternoon and we'll go into it more fully. For the moment, just tell me how the whole case went, and I'll tell you what you did right and what you didn't."

Newman went through the events of the morning. Reviewing the case in this way, he felt that perhaps he had not done too badly. He could not think of anything he had missed, nor of anywhere where he had gone too far. He was beginning to realise, too, how much he had unconsciously absorbed while listening to cases being conducted by other officers. As he finished his recital, he waited a little anxiously for the Superintendent's judgment.

"H'm," said Portly as he finished. "Not too bad for a start. All the same, there are one or two points. Now, tell me, Newman, why didn't you address the court before calling your evidence?"

"Well, sir," replied Newman, "I thought the story was perfectly simple, and that there was no point in me telling the court what they'd be getting from the witnesses. And the law involved seemed absolutely straightforward, and the Clerk was there anyway. Mind you sir, it did occur to me that after Allen's evidence they might be having doubts about the snack bar being a public place; I wished then I'd made the point at the beginning. But the Clerk seemed to put them in the picture, so I think I was right to leave it alone. I mean, I didn't want to look as though I was trying to be the clever advocate; you warned me about that, you remember, sir."

"I know," agreed Portly. "I didn't mean about the point of law. After all, it's so simple that you could hardly expect them to need any enlightenment. All the same, as it turned out it would have saved you relying on Allen seeing the point in your re-examination. That must have sounded a bit clumsy, you know."

"Well," said Newman, "once I had failed to address the court about it at the beginning, what else was I to do?"

"You could have left it alone, I think," replied Portly. "As you said yourself, the Clerk explained it to them. But what I had in mind about addressing the court before calling your evidence was that it sometimes pays to give the whole story, shortly and simply, straight through, so they've got something to hang the subsequent evidence on. You know the sort of thing."

Superintendent Portly levered himself to his feet, swept his horn-rimmed spectacles from his forehead with a gesture, and assumed a respectful affability towards a large steel engraving of a frock-coated and bewhiskered Chief Constable of some seventy years ago, which hung on the wall opposite him.

"'This case, your Worships,'" he fluted, "'arose from an incident late last Saturday night in the Follies Snack Bar in the High Street, Smallport. The proprietor, Mr. So-and-so, will tell you how he was open for business when the accused came in, and though he did not order refreshment, stood at the bar muttering what seemed to be criticism of some other customers. These customers, whom we have been unable to trace, appeared to resent the accused's remarks, and Mr. So-and-so, seeing the accused about to cause a disturbance, intervened between the accused and the other customers and ordered them all to leave his shop. The accused refused, and then a police officer arrived. The police officer will tell you how, as the accused was leaving the premises, he found in his pocket a length of chain with a heavy metal plug on the end. When asked by the police officer to account for having this chain on him, the accused made no reply, and was then arrested by the police officer and charged with an offence under section one of the Prevention of Crimes Act of 1953. I will now call the officer.'—You know the sort of thing I mean. But maybe you were right in this case. After all, there were only two witnesses, and they could give a coherent account of everything. Yes, I think you were right after all. But why put Allen in first? "

"Well, sir," replied Newman, concealing his amusement. "I thought I ought to get the evidence of arrest in first. In any case, it was Allen who found the chain, and so his was the main evidence of the case."

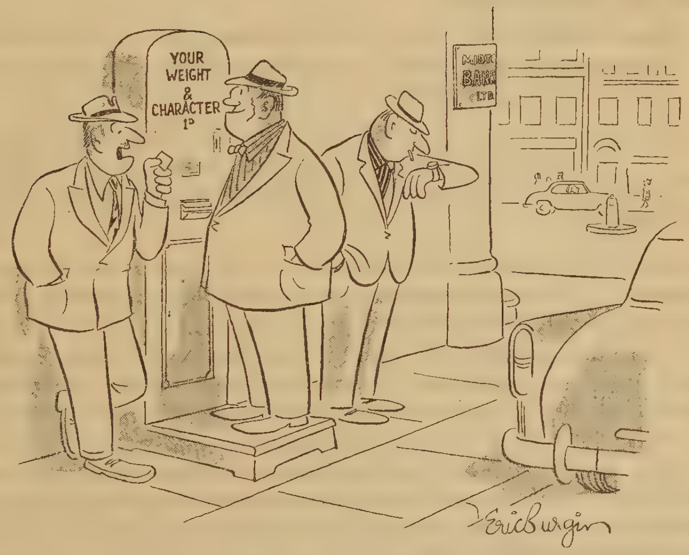
"I've never heard of having to get evidence of arrest in first," said Portly. "I should forget about that. But I see your point about Allen's evidence being the evidence of the offence. Still, it might have been a little better to put the proprietor in first, if only to get the facts out in the same order as they happened. Especially if the facts had been a little more complicated, and you had not addressed the court. Still, it's a small point. Now, about your examination of the proprietor. You were quite right to get from him the fact that he was still open for business when James came in; in other words, the public had access. But why did you bother about the other customers? Allen had already disposed of them, I should have thought. The less you ask, the better, my lad. Unnecessary questions muddle the court, yourself and the witness. It's a wise man who knows when to stop."

Newman nodded ruefully. He had not bothered to disclose to the Superintendent his foolish double-barrelled question to Castro. Nor, now he came to think of it, had he felt it necessary to include in his account of the case any mention of his last question to James, about why he hadn't given his explanation of why he had the chain in his pocket to the police officer at the time. James's answer still rang in his ears.

"Of course," went on the Superintendent, "that leaves the question of James's story still open; and his previous conviction. Still, we'll go into that this afternoon. But it's beyond me why the magistrates accepted it. It must have sounded mighty thin coming from the box like that. Why didn't he give it to the police at the time? Now that was a thing you could have asked him, you know—that would have stumped him." The Superintendent brought the fingers of his hands together, in an extremely judicious manner. " Of course," he went on, " you'd have to be careful how you put the question; you'd have to confine him to the moment when Allen found the chain in his pocket. You wouldn't want to give him a chance of saying he'd been cautioned that he needn't say anything."

" No, sir," replied Newman, " I wouldn't want to do that."

[*To be continued.*]



" It says you're ' honest, straightforward and trustworthy '—it's got your weight wrong too !"

The Street Offences Bill: A Scottish Comparison

By Superintendent W. A. RATCLIFFE,
City of Glasgow Police

Although the Street Offences Bill applies only to England and Wales it has aroused interest in Scotland because of the closer assimilation of the law which will be brought about and because of the scale of the penalties which are proposed. Street prostitution does not appear to be so rife in the Scottish towns as in comparable places in England and there can be little doubt that the difference in the existing law has much to do with this result. In addition, the system of issuing cautions without prosecuting has been carried out in Scotland for many years.

In Scotland the statutory provision which has been generally adopted to deal with the annoyance caused by prostitutes in the street is contained in section 381 of the Burgh Police (Scotland) Act, 1892, which reads:

> Every person who in any street commits any of the following offences shall be liable to a penalty not exceeding forty shillings for each offence, *viz.*, . . .
>
> 22. Being a common prostitute or street walker loiters about or importunes passengers for the purpose of prostitution.

" Street " is defined in wide terms including " all public places in the burgh."

It will be seen that subsection 22 is in essence the same as section 1 (1) of the Street Offences Bill and that in Scotland it is not necessary for the police to prove annoyance as is at present the case in England and Wales. This, of course, makes proof easier, but it also increases the chance of error on the part of the police who might the more easily mistake the purpose for which a woman is loitering or speaking to men in the street.

The present practice of preliminary warnings did, in fact, arise from this danger and was originated following an unfortunate incident involving two Glasgow constables over thirty years ago. On several evenings the constables had seen a young woman acting in a way which made them think she was soliciting. They kept her under observation and finally arrested her and charged her with being a common prostitute loitering for the purpose of prostitution. The woman had not been previously convicted and for proof of being a common prostitute the men relied upon their own observations on occasions prior to the incidents forming the charge. The magistrate found the accused not guilty and she then sued the constables in the Sheriff Court.

This resulted in the system of giving warnings before taking court proceedings. The purpose was to ensure that when a case did come before the court there would be evidence on record of previous occasions on which police action had been taken and that the accused had been afforded an opportunity to explain away her conduct which had aroused the suspicions of the police.

The procedure instituted at that time and followed ever since is that when a woman suspected to be a prostitute is seen loitering in the street the police wait until at least three men have been accosted. The last of the men accosted is then spoken to and if he confirms that the woman was importuning or if the officers are otherwise satisfied that she was so doing the woman is warned that if she persists in her conduct she will be liable to arrest and the nature of the charge that may be made against her. The officers make a record in their notebooks of all the circumstances. If the woman is seen importuning on a second occasion the same procedure is followed and the last man spoken to is told that the woman is to be arrested and is given an opportunity to come to the police station if he so desires. The writer is not aware of any instances in which the man has accepted the invitation.

The woman is then arrested and taken to the police station where she is formally cautioned and charged and an entry made in the charge book. The inspector on duty draws the woman's attention to the previous warning and again tells her of the offence which she is committing and the penalties which may be imposed if she is convicted by a court following any resumption of her conduct. The accused is then liberated and a report is sent to the Women's Help Committee (a voluntary organisation) which contacts her and gives advice and assistance to obtain employment where this is necessary. A case is not reported to the Police Procurator Fiscal for prosecution. It is only on the third occasion a woman is found importuning that she is prosecuted in court.

As originally operated the system had some obvious flaws. A woman working on the same ground might receive a number of warnings from different constables before being taken to a station for a second warning. Or by moving to a different division she could have several warnings on the street and several warnings in the different divisional stations. In fact this danger was not so great as it seems for there is a limited number of places in the city where prostitutes can make easy contacts and, in the police divisions most troubled by prostitutes importuning in the streets, constables in plain clothes are specially detailed to deal with the offenders. These men make personal contact and exchange information about women newly suspected to be prostitutes and when they have been warned. It was, however, decided to regularise the procedure by including warnings in the central records in addition to convictions and on each warning, either in the street or in a station, a "Warning to Prostitutes" form is completed and sent to the Glasgow Records Office. This form contains particulars of the name, age, address, place of birth and descriptive details and whenever a woman is to be warned a check is first made by telephoning the Records Office to ascertain if she has already received a warning. There are, of course, difficulties caused by the use of aliases and failure to correlate descriptions, but in general the introduction of the warning form proved a success.

One advantage gained by the keeping of central records is that an estimate of the deterrent value of the warnings is now possible. And it is interesting to note that a system which was introduced primarily to protect the police and assist in prosecution serves a useful purpose in turning women away from prostitution. Well over half of the women warned do not appear before a court in the city at a later date. No one would claim this to be a true reflection of the efficacy of the warnings as a reformative measure for, apart from aliases and failure to link descriptions, the woman may go to another town or may even cross the Scottish border to seek territory where prostitution is less easily driven from the streets. But the follow-up calls show that a surprisingly large number of the girls are, in fact, reclaimed.

The Immoral Traffic (Scotland) Act, 1902, deals with:

> Every male person who—
>
> (*a*) knowingly lives wholly or in part on the earnings of prostitution; or
>
> (*b*) in any public place persistently solicits or importunes for immoral purposes.

The penalty is six months' imprisonment on summary conviction.

These provisions correspond with sections 30 and 32 of the Sexual Offences Act, 1956, in England, but in Scotland there has never been any doubt that a male person soliciting females in the street was committing an offence. This may be due to the preamble to the 1902 Act which reads "An Act to make further provision for the punishment of persons trading in prostitution."

Offences under Sections 11 and 12 of the Road Traffic Act, 1930

By KEITH C. CLARKE,

Prosecuting Solicitor, Southampton Corporation

2. Identifying the driver and driving on a "road"

Identifying the driver

Towards the end of the last article in this series, we had begun to consider the matter of the prosecution identifying the defendant as the driver of the vehicle alleged to have been driven carelessly or dangerously, etc.

In many prosecutions under sections 11 and 12, the circumstances are as follows: The driver of the offending vehicle does not stop after the incident which is the subject-matter of the proceedings. A witness notices the registration number of the vehicle and informs the police of this. A police officer then interviews the defendant, who admits having driven this vehicle on the day and at the time in question, but denies all knowledge of the incident. In such a case, the prosecution should make certain that the witness to the incident is available to testify as to the registration number of the vehicle in question. This is a matter of the utmost importance and the following points should be borne in mind:

(i) Such a witness may give evidence of the registration number of the vehicle by reference to a piece of paper or other document, upon which he noted the number at the time of the incident or shortly afterwards.[1]

(ii) The original memorandum of the number of the vehicle which the witness made at the time of the incident may since have been lost, but before losing it and by reference to it the witness may have copied the number onto a second memorandum. In such a case, the witness could, if necessary, use the second memorandum to refresh his memory of the number.[2]

(iii) If the witness made no memorandum of the number of the vehicle at the time of the incident, or if there was such a memorandum but it has since been lost, then the witness may well be unable to remember the number at the hearing of the case. However, if shortly after the incident he dictated to the police a statement which he signed and in which he mentioned the number, then it seems that he may properly be allowed to refresh his memory of the number by reference to that statement.[3]

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[1] *Kensington* v. *Inglis* (1807) 8 East 273.

[2] *Talbot de Malahide* v. *Cusack* (1864) 12 L.T. 678.

(iv) Sometimes the following situation can arise: Witness A noticed the number of the offending vehicle and caused witness B, who did not notice the number, to write it down on a piece of paper. Witness A then forgot the number. If this is the case, then evidence of what the number was will have to be elicited in one of the following ways: (a) by calling A to say that he noticed the number at the time, caused B to write it down on a piece of paper, and to produce and identify the piece of paper in question, or (b) by calling A to say that he noticed the number at the time and caused B to write it down, and B to confirm this and to say what number he wrote down.[4]

(v) Where, in such a case, evidence of only part of the registration number, *e.g.*, the letters only, is available, then this will generally be insufficient unless it is coupled with additional evidence, *e.g.*, where the offending vehicle is identified as a lorry or van belonging to a particular firm, and someone from the firm is able to say that they only have one vehicle bearing those letters and the defendant was employed to use it at that particular time.

What is a road?

We now come to the second element which the prosecution must prove in all cases under sections 11 and 12, namely, that the defendant was driving the vehicle on a road.

" Road " is defined in section 121 (1) of the Road Traffic Act, 1930, as meaning " *any highway and any other road to which the public has access*." The same definition of " road " will be found in the Road Traffic Act, 1956, s. 54 (1), and the Road Transport Lighting Act, 1957, s. 17 (formerly the Road Transport Lighting Act, 1927, s. 15). In cases under sections 11 and 12, it sometimes happens that, whilst the prosecution are able to produce evidence to the effect that the defendant drove the vehicle in question carelessly or dangerously, etc., they are in some difficulty in deciding whether the land upon which the vehicle was driven can properly be said to be a road within the meaning of section 121 (1). The writer suggests that, in cases where this difficulty arises, it may be helpful to bear in mind the following points:

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[3] *R.* v. *Cuffey* (1848) 12 J.P. 807.

[4] *Grew* v. *Cubitt* (1951) 49 L.G.R. 650.

(i) *If the land in question is to be brought within the definition of a "road," then the answers to both of the following questions must be in the affirmative*:

(*a*) *Could the land, by virtue of its structure and geographical layout, be described as a road in the ordinary sense of the word* (*i.e., a line of communication leading from one place to another for the use of passengers*)*? and* (b) *Do the public have access to the land in question ?*

If the answer to either of these questions is in the negative, then the land will not be a road within the meaning of the Act.

This can be illustrated by referring to a number of cases. In *Heath* v. *Pearson* [5] the defendant was summoned under section 1 of the Road Transport Lighting Act, 1927, for causing his motor-car to be on a road, during the hours of darkness, without lights. The land upon which the car was found was an unpaved yard adjoining a beerhouse and was not a thoroughfare, being completely enclosed except for an entrance which led into the adjoining public highway. There were a number of small occupied cottages in the yard. The Divisional Court held that, although the yard might well, on the evidence, be a place to which the public had access, that was not by itself sufficient to bring it within the definition of a road in section 15 of the 1927 Act, since it also had to be a road in the ordinary sense. The magistrates had found that this yard was not a road in the ordinary sense, and the Divisional Court refused to interfere with that finding. In *Griffin* v. *Squires* [6] the defendant was summoned under sections 4 (1) and 35 of the Road Traffic Act, 1930, on the grounds that she was unlicensed and uninsured when she drove her motor-car on a car park which was owned and maintained by the local authority. The public were allowed to use this car park at all times without payment. The Divisional Court held that, although the car park could be said to be a place to which the public had access, there was evidence to justify the finding of the magistrates that it was not a road in the ordinary sense. It was, therefore, decided that no offences had been committed. It will be seen that, in both of these cases, whereas the answers to question (b), *supra*, are in the affirmative, the answers to question (a), *supra*, are in the negative, and accordingly the land in question in each case is not a road.

In *O'Brien* v. *Trafalgar Insurance Co.*,[7] what was admittedly a road in the ordinary sense within the fenced grounds of a royal ordnance factory was held not to be a road within section 121 (1), because members of the public were not admitted unless they had a special pass and the entrance gates were guarded by the police. Similarly, in *Buchanan* v. *Motor Insurers' Bureau*,[8] it was held that a road within the dock area of the Port of London was not a road within section 121 (1), since only authorised persons were allowed to use the road and all entrances were guarded by the Port of London authority police (such a road, however, is now included in the 1930 Act definition by virtue of a local Act). It will be seen that in each of these cases the answers to question (a), *supra*, are in the affirmative, but the land in question in each case is not a road because the answers to question (b), *supra*, are in the negative.

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[5] [1957] Crim.L.R. 195.
[6] [1958] 1 W.L.R. 1106.
[7] (1945) 109 J.P. 107.

In *Newcastle-upon-Tyne Corporation* v. *Walton*[9] the court had to determine whether a quayside owned by the corporation was a road within section 121 (1). Members of the public were allowed to walk and motor along the quayside, and there was no physical obstruction preventing them from doing so and no notice prohibiting the use of the quayside by members of the public. It seems to have been accepted that the quayside could be described as a road in the ordinary sense. The Divisional Court held that the quayside was a road within section 121 (1) and that the corporation could, therefore, be convicted of certain offences under the 1930 Act, and regulations made thereunder, by virtue of the use of a mobile crane belonging to them on the quayside. It will be noted that in this case the answers to both questions (a) and (b), *supra*, are in the affirmative.

(ii) *"Highway" in section 121 (1) means any road to which the public may come by virtue of a common law right, and the rest of the definition is inserted to say that "road" in the Act includes any road to which the public can, in fact, get by permission or sufferance.*

This is demonstrated by the Scottish case of *Harrison* v. *Hill*,[10] where it was held that a private road leading from the main road to a farmhouse and maintained by the farmer was a road within section 121 (1). The road in question had no gate on it and there was no sign or indication to the effect that the public were not to use it. People who had no business on the farm sometimes used the road when taking a walk, and sometimes the farmer had turned them off when crops were growing in the adjoining fields. In this case, Lord Clyde said: "It is plain, from the terms of the definition, that the class of road intended is wider than the class of public roads to which the public has access in virtue of a positive right belonging to the public, and flowing either from statute or from prescriptive user. A road may, therefore, be within the definition (1) although it belongs to the class of private roads, and (2) although all that can be said with regard to its availability to the public is that the public 'has access' to it." Further, Lord Sands said: "In my view, any road may be regarded as a road to which the public have access upon which members of the public are to be found who have not obtained access either by overcoming a physical obstruction or in defiance of prohibition express or implied."

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[8] [1955] 1 All E.R. 607; 119 J.P. 227.

[9] [1957] Crim.L.R. 479.

[10] 1932 S.C.(J.) 13.

In *Bugge* v. *Taylor* [11] it was held that the forecourt of an hotel which was the property of the hotel and was in no way separated from the main road adjoining the hotel, was a road within section 15 of the Road Transport Lighting Act, 1927. In this case, the public were in the habit of walking over the forecourt as a short cut from the main street to another street, and on occasions vehicles had driven over it. Although the public had no access to the forecourt as of right, the hotel allowed it to be used as though it was part of the main road. When the case was heard by the Divisional Court, one of the arguments put forward by counsel was that, since the public had no access to the forecourt as of right and since the hotel could close the forecourt from the public at any time, it was not a road to which the public had access within the meaning of the Act. The court rejected this argument and, in holding that the forecourt was a road, adopted the decision in *Harrison* v. *Hill*. It will also be recalled that in *Newcastle-upon-Tyne Corporation* v. *Walton* the quayside was held to be a road within section 121 (1), although the public had no access to it as of right.

(iii) *The expression "the public" means the public generally and not a special class of members of the public.*

This is illustrated by the decisions in *O'Brien* v. *Trafalgar Insurance Co.*, *supra*, and *Buchanan* v. *Motor Insurers' Bureau*, *supra*.

(iv) *"It has been said many times that it is eminently a question of fact for the magistrates to say whether a certain space is a road."* [12]

It follows that the decision of the magistrates as to whether the land in question is a road within the meaning of the Act will only be upset by the High Court if there is no evidence to support that decision, and each case will be decided upon its own special facts. This is well illustrated by comparing the decision in *Bugge* v. *Taylor* with that of the Divisional Court in *Thomas* v. *Dando*.[13] In the last-mentioned case, the question arose as to whether the unpaved forecourt of a shop which was not separated by a wall or rail from the adjoining street pavement was a road within section 15 of the Road Transport Lighting Act, 1927. The forecourt was not habitually used by members of the public, but only by the customers of the shop. The court decided that this forecourt was not a road within the meaning of the Act, and Lord Goddard C.J. distinguished this case from the decision in *Bugge* v. *Taylor*. He pointed out that in *Bugge* v. *Taylor* the Divisional Court decided that the hotel forecourt was a road within the meaning of the Act of 1927, because there was evidence to justify the finding of the justices that it was a road and for that reason only. He went on to say, referring to *Bugge* v. *Taylor*, that " . . . it was not laid down that a court is bound to find that a place is a road for the purposes of the Act of 1927, merely because it is not separated by a wall or rail from the highway." Finally, referring to the case under consideration, Lord Goddard said: " After hearing the evidence, the learned magistrate came to the conclusion that it (*i.e.*, the forecourt to the shop) was a piece of private property which the public did not habitually use, and in my opinion he was *justified in finding that it was not a road* within the meaning of section 1 (1) of the Act of 1927."

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[11] (1940) 104 J.P. 467.

[12] *Per* Lord Parker C.J. in *Griffin* v. *Squires*.

(v) It should be noted that the footway, as well as the carriageway, is included in the meaning of the word " road," [14] and that, although a highway may be temporarily roped off, it nevertheless remains a highway.[15]

The Port of London Act, 1950, s. 21, applies, *inter alia*, sections 11 and 12 of the Road Traffic Act, 1930, to roads within the dock area of the Port of London authority. Similarly, the British Transport Commission Act, 1956, s. 27, applies sections 11 and 12 of the 1930 Act to dock roads in the dock and harbour premises of the British Transport Commission.

[*To be continued*]

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[13] [1951] 1 All E.R. 1010; 115 J.P. 344.
[14] *Bryant* v. *Marx* (1932) 96 J.P. 383.
[15] *McCrone* v. *Rigby* (1952) 50 L.G.R. 115.

The Concept of Crime: An American View

By Graham Hughes, M.A., LL.B.
Senior Fellow, Yale Law School

(*Continued from p. 249, ante*)

Psychopaths

Constitutional issues have been raised in the United States by statutes for the compulsory detention of persons identified as sexual psychopaths or criminal sexual psychopaths. Such a case was *People* v. *Chapman*,[36] concerning a Michigan statute establishing a class of criminal sexual psychopaths defined as persons suffering from a mental disorder but who are not insane or feeble minded, which mental disorder has existed for a period of not less than one year and is coupled with criminal propensities to the commission of sex offences. The statute establishes a procedure by which, where any person is charged with crime and it appears that such person is a criminal sexual psychopath, the prosecuting attorney should file with the court an allegation to this effect. On the filing of such a statement the court appoints two psychiatrists to examine the accused person and if both psychiatrists report that the accused is a criminal sexual psychopath then a hearing is held. If the court determines the person to be such a criminal sexual psychopath he is committed to a state hospital. The defendant objected to his committal under this procedure on a variety of grounds, one of which was that it violated the *ex post facto* provisions of the Michigan constitution.[37]

The court referred in its opinion to an earlier Michigan case in which a statute dealing with the confinement of sex offenders after conviction and sentence had been held to be unconstitutional.[38] In the majority opinion in the earlier case the court had said:

> "We must class [the statute] where we find it placed by its authors, and we find it in the mentioned criminal code chapter relating to judgments and sentences in criminal cases." [39]

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[36] 4 N.W. 2d 18, 301 Mich. 584 (1942).
[37] Constitution of State of Michigan, Art. 2, § 9.
[38] *People* v. *Frontczak*, 281 N.W. 534, 286 Mich. 51 (1938).
[39] 281 N.W. at p. 536.

But in *Chapman* the court was able to distinguish the earlier case because, they said,

> "the present statute is not contained in either the Code of Criminal Procedure or the Penal Code. It makes sex deviators subject to restraint because of their acts and condition, and not because of their conviction and sentence for a criminal offence. . . . Proceedings under the present statute . . . are not circumscribed by the constitution and statutory limitations surrounding a person accused of or tried for a crime."[40]

It is submitted that the court is sinking here into a Humpty Dumpty attitude to language. In accepting the legislative affixing of a label to proceedings as conclusive of their nature, it abdicates its function of searching out unconstitutional processes. It is driven to the remarkable conclusion that an order for the detention of a sex offender after conviction and sentence may be unconstitutional since it amounts to additional punishment, but the confinement of a psychopath who has never been judicially convicted of a sex offence is proper. And this is because the first proceedings are labelled criminal by the legislature while the second set is otherwise described. What the court fails to perceive is that classification of proceedings here is an attributive operation. The process of classification entails the annexation of vital consequences; it is not at all the sort of classification performed by the zoologist in deciding to call a new specimen an amphibian or a reptile. The zoologist is informed or not informed about the characteristics of his specimen and his classification of it may well depend on whether in his judgment reptilian or amphibian features predominate. But in either case no consequences ensue to the structure of the specimen. The court in classifying a proceeding as criminal is performing a policy creating act and to point only to the section of the code in which the process is promulgated or only to the use of adjectives such as "criminal" or "civil" by the legislature is to abdicate this policy-making or policy-controlling function. This would seem to be exactly what a court should not do in a system which contains express constitutional provisions for the protection of the citizen.

It may be admitted that the dichotomy between the criminal and civil branches of the law is not the best framework in which to solve such questions of policy. When novel procedures are emerging which are clearly difficult of identification with the well-established criminal processes but which equally clearly pose threats to the liberty of the subject, a fresh method of approach might well be desirable.[41] But, given the present constitutional provisions, it is often unavoidable that such questions must be settled in terms of the criminal process. That being so, the inquiry ought clearly to be into the nature of the impingement of the process on the individual and the community and not into the verbal labels of the legislature.

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[40] 4 N.W. 2d at p. 26.

Loyalty and security cases

The field in which this problem has recently assumed the most difficult form is that of the security or loyalty cases. Two may be considered here.

In *United States* v. *Lovett*,[42] the respondents had for several years been government employees. In a speech in the House of Representatives by Congressman Dies, the Chairman of the House Committee on Un-American Activities, they had been described as being unfit to hold government office since, it was alleged, they were affiliates of "communist front organisation organisations." As a result of debate arising out of this speech Congress provided in the Urgent Deficiency Appropriation Act of 1943 that no salary or compensation should be paid to the respondents out of any moneys appropriated. The employing government agencies, however, did not dismiss the respondents though the payment of their salaries was discontinued. Respondents sued for their remuneration in the Court of Claims and recovered. The matter came to the Supreme Court of the United States on certiorari.

The respondents urged several points against the constitutionality of the statute, but the only one discussed by the Supreme Court was the argument that the statute amounted to a bill of attainder, thus violating Article I, Section 9, Clause 3 of the Constitution of the United States.[43] With this contention the majority agreed. They felt that the effect of the statute must be not only to cut off the respondents' compensation but also to bar them permanently from government service.

> "What was challenged therefore is a statute which, because of what Congress thought to be their political beliefs, prohibited respondents from ever engaging in any government work. . . ."[44]

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[41] See Donnelly, "The Law of Evidence: Privacy and Disclosure," 14 *Louisiana Law Review* 361 (1954).

[42] 328 U.S. 303, 66 S.Ct. 1073 (1946).

[43] "No Bill of Attainder or *ex post facto* Law shall be passed."

[44] 328 U.S. at p. 314.

The statute " stigmatised their reputation and seriously impaired their chance to earn a living." [45] The statute therefore fell within the definition of bill of attainder to be found in an earlier case: " A bill of attainder is a legislative act which inflicts punishment without judicial trial." [46] This permanent proscription, said the court,

> " from any opportunity to serve the Government is punishment and of a most severe type. It is a type of punishment which Congress has only invoked for special types of odious and dangerous crimes such as treason." [47]

The majority judgment thus amounts to a holding that the respondents had been punished. What was the crucial element which identified punishment here? The court laid most stress on the proscription from future service. Presumably a statute withholding appropriations for the salary of X because his job was expressed to be redundant would be valid since X would be able to apply for other service. What of a statute which withheld appropriations for the salary of X on the ground that he was an incompetent official? It is difficult to escape the feeling that the majority opinion was much influenced by the background of the legislation in the *Lovett* case and particularly by the charges which had been levelled against the accused in debate and on which the statutory provision was based. The court referred to the stigma on the reputation of the respondents. We may say then that the statutory provision constituted punishment because of the nature of the accusation (though it was not an accusation of a specific criminal offence) coupled with the nature of the deprivation imposed.

Frankfurter J. and Reed J. concurred on wholly different grounds. They were disposed not to regard the statute as a bill of attainder on the ground that it did not contain in itself a charge against the defendants. Frankfurter J. said:

> " Punishment presupposes an offence, not necessarily an act previously declared criminal, but an act for which retribution is exacted. The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for the deprivation." [48]

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[45] *Ibid.*

[46] *Cummings* v. *Missouri*, 4 Wallace 277, 323 (1867).

[47] 328 U.S. at p. 316.

[48] At p. 324.

With the proposition that not all harm is punishment one cannot quarrel. But the proposition that government can expel the notion of punishment from the infliction of harm by failing to disclose its motives for the infliction is much more dubious. This is an invitation to chop off heads for undisclosed reasons. It is to be hoped that in our society government can never inflict harm of a type long recognised as falling within the scope of criminal sanctions without disclosing its reasons. Dismissal from office has never been identified exclusively with criminal sanction; but disqualification from office has been. The majority in the *Lovett* case was surely right in perceiving that the kind of harm imposed here was traditionally associated with criminal sanction and in therefore not permitting the legislature to take itself out of the field of bill of attainder by failing to disclose its motives in the bill itself. Frankfurter J. was perhaps right in hinting that what is conventionally a criminal sanction may be taken out of the field of criminal punishment if special and extraordinary reasons are urged by government. But this should hardly apply where government fails to disclose its reasons. The motives of the legislature may be hard to discover but when they seek to impose what is normally associated with criminal sanction the burden is or should be on the legislature to convince the court that it is operating outside this field.

The *Lovett* case was concerned with legislative imposition of punishment. Executive action came under question in *Bailey* v. *Richardson*.[49] Here the appellant had been employed as a training officer in the civil service, a non-sensitive position. She was requested by the Regional Loyalty Board of the Civil Service Commission to answer an interrogatory based on information questioning her loyalty which had been lodged with the Board. In the course of the investigation which followed the appellant was denied any opportunity to confront her accusers who remained secret. In spite of her vehement assertions of loyalty and her denial of affiliation with any subversive organisations she was dismissed from the Civil Service and was barred from civil service examinations in the Federal service for a period of three years. She brought an action in the United States District Court for the District of Columbia for a declaratory judgment and for an order directing her reinstatement. The District Court ruled against her and she appealed to the United States Court of Appeals for the District of Columbia.

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[49] 182 F. 2d 46 (1950) (U.S. Court of Appeals for District of Columbia). The case later went to the Supreme Court on certiorari where the judgment of the Court of Appeals was confirmed by an equally divided court, 341 U.S. 918 (1951) (Clark J. taking no part in the consideration or decisions). No opinions were delivered in the Supreme Court.

Clearly the most potent issues of policy were involved. At first sight it appears unthinkable to question the executive's right to dismiss its employees for any reason or for undisclosed reasons. But here the exceptional nature of the stigma involved in the reason for the dismissal and the imposition of the three-year ban were urged as creating an extraordinary situation. The majority of the Court of Appeals felt that the *Lovett* case bound them to hold that the three-year ban was in the nature of criminal punishment and could not therefore be imposed in the absence of a judicial trial. "Punishment can be inflicted lawfully only upon compliance with the Sixth Amendment."[50] The dismissal itself, however, did not come within the ambit of the Sixth Amendment (nor the Fifth since a job is not property). One wonders how great the appellant's chances of re-employment within three years would have been even in the absence of the three-year ban.

Judge Edgerton, dissenting, held the whole process to be unconstitutional. He began:

> "Without trial by jury, without evidence, and without even being allowed to confront her accusers or to know their identity, a citizen of the United States has been found disloyal to the Government of the United States."[51]

He took the view that dismissal for disloyalty is punishment and requires all the safeguards of judicial trial.

> "Most dismissals, including among others dismissals for colourless or undisclosed reasons and dismissals for incompetence are plainly not punitive. . . . But dismissals for disloyal views are punitive."[52]

Judge Edgerton was clearly allowing his concept of punishment to be shaped by the motive of the deprivers. Disloyalty in this sense is not a specific criminal offence but, in his view, it creates such an aura of stigma that any deprivation consequent upon such a charge deserves to be identified with criminal punishment.

It is submitted that there is no good reason for singling out disloyalty as a special case of dismissal. What of a dismissal for immorality? Most dismissals must be attended by an atmosphere of disrepute; if they are based on reasons which reflect on the credit of the employee then, given publication and an absence of privilege, he may have his remedy in the law of defamation. But to extend the concept of punishment into an area which it has never previously invaded is unjustifiable when such an extension might pose a threat to the national security or to the efficient administration of the civil service. In the policy decision made in the *Bailey* case, it is suggested that the majority of the court chose wisely.

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[50] 182 F. 2d at p. 55.
[51] At p. 66.
[52] At p. 69.

Korematsu

One more case may be examined, *Korematsu* v. *United States.*[53] Here the petitioner was an American citizen of Japanese descent. He had been convicted of violating an order of the Commanding General of the Western Command, U.S. Army, directing that all persons of Japanese ancestry should be excluded from the area in which the petitioner resided. The military commander was empowered to make restrictive regulations as to residence by an Act of Congress.

The majority of the Supreme Court referred to their earlier decision which had validated a curfew regulation imposed on persons of Japanese origin. They said:

> " Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. . . . The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin." [54]

Roberts J., Murphy J., and Jackson J., dissented. Roberts J. viewed the case as one of

> " convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp based on his ancestry." [55]

It will be remembered that in the *Wong Wing* case the court had assumed that for a citizen banishment would amount to punishment, though for an alien the position was different. Now, in the *Korematsu* case, we find a citizen banished, at least from his area of residence, but the majority holds it not to be punishment. We can only conclude that the interest in national security can be so great that it displaces the usual concept of punishment. This was easy to understand in Britain with the application of Regulation 18B, since there were no constitutional issues to be raised. In the United States it is difficult in view of the presence of express constitutional guarantees to see how the maxim *inter arma silent leges* can be justified. If what is normally punishment can cease to be so because of a national emergency, one would expect to find this expressly contemplated by the constitution. While Judge Edgerton in the *Bailey* case was prepared to regard what is not normally punishment as becoming so because of the purpose with which the deprivation was imposed, the Supreme Court in *Korematsu* held that what is normally punishment is not so, again because of the purpose of the deprivation. This has the air of a "This hurts me more than its hurts you" theory of punishment, depriving the constitutional guarantees of their potency.

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[53] 323 U.S. 214, 65 S.Ct. 193 (1944).

[54] 323 U.S. at pp. 218–219. The earlier case was *Hirabayashi* v. *U. S.*, 320 U.S. 81, 63 S.Ct. 1375 (1943).

[55] 323 U.S. at p. 226.

In conclusion we may revert to Dr. Williams' approach to the definition of crime and consider its utility. It is submitted that the sense of inadequacy felt by American lawyers in Dr. Williams' essay springs from its failure to give advice on the comparative importance of the various criteria which may be viewed in determining the nature of a process. One reason for this is surely that Dr. Williams was addressing himself to English criminal law where these criteria have been much less canvassed and where their balancing is never a vital or dramatic issue. But American lawyers are certainly entitled to point out that for their purposes the elucidation of the relevant criteria and their evaluation is the vital task. We have perhaps seen that it is certainly no easy task. The main considerations which seem to influence courts are the nature of the charge, the nature of the deprivation, the status of the defendant, the purpose with which the deprivation is imposed and the national security. The balancing of these competing interests is a delicate matter and it is essential to insist that it is a vital matter of policy.

Zoologists dispute about the classification of seymouria as a reptile or amphibian but this dispute will have no impact on the structure of seymouria. It is not a policy question in that sense. It is perhaps suspected in the United States that Dr. Williams is contending that the classification of proceedings as civil or criminal is similarly a cataloguing procedure devoid of practical implications. I think a close study of his essay clearly exonerates him of this charge. Indeed, he makes it clear that matters of policy are involved in the court's creative choice of a label. As far as it goes his approach is accurate and instructive even for the American lawyer. But he stops short of an examination of the possible criteria involved in the choice and a value judgment upon them. Dr. Williams indeed shielded himself at the end of his essay when he remarked:

> "The features actually taken by the courts as indicative of crime and the particular problems that arise in classifying proceedings must be left for discussion on another occasion."[56]

It is precisely these features and problems which are matters of much concern to the American constitutional lawyer.

Some Notes on Forensic Ballistics

By HAMILTON G. F. BANTOCK,
Detective Chief Inspector,
Birmingham City Police

Introduction

We live in an age when the size, range and effect of offensive weapons stagger the imagination, but in Greek and Roman times fortresses were attacked and defended with an engine of war known as a *ballista.* Instead of giving up their wedding rings and kitchen utensils for the purchase or manufacture of armaments, the women of those days used to cut off their hair and give it to the State. It was plaited into ropes for use as the *elastic* or propellant for discharging the missiles such as stones and fire pots at the enemy. The dictionary meaning of *ballistics* is the theory of the flight of projectiles through various media, *e.g.*, air, water, vacuum and the term "forensic ballistics" means the science of ballistics as applied to the courts of law with a more specific meaning of that specialised knowledge of firearms and ammunition which can be of assistance to the courts in their work.

In many cases which come before magistrates' courts, H.M. coroners' inquests, courts of quarter sessions and assize, in this country, where firearms and cartridges have been used, some special knowledge is required to assist the court in arriving at the truth of the facts before them. In these instances a so-called "firearms expert" may be called to give evidence for that purpose.

Prominence was first given to this type of witness in the United States of America, when the late Lieut.-Colonel Calvin M. Goddard, M. Waite, Major-General J. S. Hatcher and others gave evidence as to their physical examination of the weapons used and certain tests they had carried out. In Great Britain a famous case where evidence of this kind was used, was in connection with the murder of Police Constable Gutteridge in Essex in 1927. On this occasion ordnance officers were called from Woolwich Arsenal to speak as to the types of ammunition used and, although not given in evidence, microscopic examination was made of the breech face and striker markings of many revolvers for the purpose of identifying the actual weapon which had been used to kill the police officer. Major Sir Gerald Burrard, D.S.O., and the late Mr. Robert Churchill are well-known experts in this country who have given evidence of this type.

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[56] 8 *Current Legal Problems* (1955), at p. 130.

The well-tried and much used Home Office Forensic Science Laboratories in this country have facilities for macro- and microscopic examination of materials submitted to the laboratory and in these days, the evidence of qualified witnesses is accepted by the courts. Such evidence always includes a factual, physical examination and in some cases " opinions " to which these examinations point—the guiding factor always being to arrive at the truth of the matter. The scientific evidence may assist the defence, the prosecution, and often both.

In this article it is hoped that guidance may be given to police officers whose work may involve examinations at the scene of shooting incidents, for in most cases involving death or injury caused by firearms, the assistance of the police is soon required. Much of what is said may also be useful to other persons whose work may require some knowledge of the use and abuse of firearms.

It is obvious that in many cases involving death or injury by shooting, there are only two witnesses to the occurrence—the person shooting and the person shot at. If the latter is dead, this source of evidence is not available. However, painstaking search, an understanding of firearms and how they work, commonsense and the ability to interpret what is found, may sometimes throw light on the matter. What at first may be quite inexplicable may be built up, piece by piece, into a coherent picture of the incident.

In shooting cases the circumstances can conveniently be divided into three stages: (1) acts of preparation, (2) the discharge of the weapon and (3) the results of the discharge.

Acts of preparation

Under the first heading inquiry must be directed to the origin of the weapon and ammunition and their possession by the user; the manipulation of the mechanism, including the act of loading;

the cocking of the weapon; the movement of any safety device; and finally the pointing of the weapon at the victim and the pressure on the trigger to fire it.

The acts of preparation are often considered in law to show intent, which may seriously affect the nature and gravity of an offence with which the accused person is charged.

Discharge

Under the heading "discharge" must be considered the mechanical effect of pressing the trigger, the sequence of events leading up to the fall of the hammer or release of the striker; the results of the striker blow on the percussion cap and the firing of the cartridge; the passage of the bullet or shot charge up the barrel and finally its emergence from the muzzle. This sequence of events is described in certain textbooks as "interior ballistics." Under the third heading must be studied the effects of the discharge, *i.e.*, burning, tattooing and blackening of clothing or flesh; the trajectory of the projectile; the results of any contacts before striking the target; the effects upon the person or object struck and, lastly, anything which brought the missile to rest whether it be animate or inanimate.

Some of the highly technical aspects of shooting are dealt with in textbooks on forensic medicine or guns and reference is made in the concluding bibliographical note to many books on these and kindred subjects.

Scene of the shooting

The material found at or near the scene of the shooting must be considered in regard to the circumstances of the occurrence—thus the finding of shot-gun wads would suggest that a smooth bore weapon had probably been used, and an examination of such a wad might assist in determining the bore size of the weapon used.

It is necessary at an early stage for the police to consider whether the shooting is one of the forms of homicide or accidental, as this would have very different consequences for the person discharging the firearm.

Classification of firearms

When considering some of these aspects of forensic ballistics, it is convenient to classify firearms into three groups: (*a*) smooth bore weapons, including shotguns and some air weapons; (*b*) rifled arms, including rifles, revolvers and single shot pistols, and (*c*) automatic arms, such as self-loading pistols, machine carbines, machine guns and automatic shotguns. On the other hand, the cartridges used may be divided into the trade divisions of " sporting ammunition " (which includes paper case shotgun cartridges) and " metallic ammunition " or those cartridges in which the cases are made of metal and are usually loaded with a single missile.

Viewing the scene

It is very important that the scene be viewed objectively from the outset. The positions of articles found should be carefully noted; particular attention being paid to the position of the body and any bloodstains. Fingerprints are often taken from the deceased person to eliminate his or her prints from any others which may be found. In most cases photographs are of very great assistance and these, together with sketches or plans, make for a much more ready appreciation of the facts and their possible reconstruction.

Shotguns

The shotgun is a very deadly weapon at close range. It is a common article found in many households, particularly in country districts. It is also a weapon conveniently used by would-be suicides in view of the fact that it is easy for an adult to purchase without restriction. The cartridges are equally easy to obtain. An important factor in all shooting cases is the range at which the shot was fired and within limits an accurate estimation can be arrived at by firing test shots at specified ranges and comparing the effects of burning, blackening, tattooing and spread of shot with the external appearances of the entrance wound and on the clothing or flesh of the victim.

Position of the body

The position of the body is important, but it must always be remembered that when human beings are suddenly killed, the body can fall in various ways and may also turn in falling. It is, therefore, unwise to conjecture from which direction the death-dealing missile came, unless some other evidence can be found. A bullet lodged in a wall or door, which had passed through the body after inflicting injury, or some fixed object, struck by the bullet before striking the body, is a far better fact upon which to base an assumption than the entrance and exit wounds on a body. In these cases, an experienced doctor or pathologist can give invaluable help to the investigating officer. The direction of the track of each individual missile through the body, or in the case of a charge of shot, the general direction should always be considered before any conclusion is arrived at. It must be borne in mind, however, that a bullet may be deflected from its general direction as a result of meeting an obstruction within the body itself. In shotgun injuries the whole of the shot charge often remains in the body, unless the victim is struck by the outer fringe of the spread or the discharge is a very close one.

Removal of firearms

One of the duties of the police is the protection of life and property and the removal of a dangerous object may seem good public policy, but in cases where firearms have been used it is better not to interfere with the weapon at all, except to remove it to a place of safety. There may be fingerprints, bloodstains or other débris on the weapon and these must not be disturbed until they have been properly examined. Opening the gun to see whether it is loaded or not is best left to someone competent to speak as to its condition, because it is not generally realised that with most hammerless shotguns, the opening or " breaking open " of the weapon, automatically cocks the internal hammer and moves the safety slide to the " safe " position. The trigger should never be pressed or pulled because (1) the weapon may still be loaded in one of the barrels if it be a double-barrelled weapon, and (2) the microscopic examination of any striker indentation upon the percussion cap caused by the initial firing will not be improved by repeated blows from the striker, caused by irresponsible handling of the weapon.

It is usually possible to ascertain whether a cartridge has been fired in a particular weapon and/or the barrel concerned. The inside of the barrels of firearms recently discharged have a distinctive smell and the presence or absence of such odour should be noted at an early opportunity. This can easily be done without interfering with the mechanism itself. Evidence of recent discharge apart from the smell is usually shown by the presence of fouling in the barrel, but no time factor can be associated with this as a general rule.

With *shotguns*, the fired cartridge case is often found in the chamber, because one shot is usually sufficiently lethal. However, in some cases of " murder and suicide " or plain suicide, the gun has to be loaded and fired many times before the desired result is obtained and empty shotgun cartridge cases are sometimes strewn about the various rooms of a house. Again, in what at first appears to be suicide the position of the weapon may give some guide as to whether the circumstances point to suicide or an act by some other person. The site of the wound itself, will, of course, have an important bearing on this.

An endeavour should always be made to tie up the number of fired cartridge cases found with the number of shots fired. Cartridge cases are sometimes found in quite out of the way places and this particularly applies to automatic or self-loading shotguns. Upon firing, this type of weapon automatically extracts from the chamber and ejects the cartridge case just fired, in order to make way for its replacement by another loaded cartridge from a magazine. Weapons of this type sometimes eject their cases for a considerable distance and in addition, they may roll even further away.

Boxes of loaded cartridges should always be taken possession of by the police, as test cartridges are often required of the same make and type as those used in the actual shooting. In one case the date of manufacture of the cartridges made all the difference between what at first appeared to be an accidental shooting and murder.

The maximum lethal range of shotgun pellets is not easily arrived at, because no tests have yet been carried out on live human beings. In any case the size of the pellet fired has a considerable bearing upon its ability to cause injury, disregarding the part of the body struck and whether it was clothed or not. The range usually considered lethal when firing at small birds and animals is about 50 to 60 yards, with average shot sizes.

The finding of wads, either in the body or at the scene, will often determine the number of shots fired, although too much reliance must not be placed upon their fall, particularly out of doors, in so far as it is related to the direction or range from which they have been fired. In some instances all the wads may be found behind the firer if the wind is high and in the appropriate direction. Wads, however, may be very useful in determining the size and sometimes the type of cartridge used, when the weapon is missing.

Finally, with shotguns, it is surprising how many decrepit weapons are used. Many old guns "proved" only for use with black powder, are used with modern smokeless cartridges loaded with nitro powder. In some cases the mechanical condition of these neglected guns (often found in country districts) renders them as dangerous to the person firing as to the person fired at. It is essential that shots be fired from any firearm before an opinion can be given that it is effective or lethal. In some cases, an examination of the weapon will reveal a mechanical defect which would make it liable to accidental discharge.

Air weapons do not often cause death, but the loss of an eye is easily caused. Accidents with air weapons, particularly to children, are fairly common and often very distressing. In 1949, it was alleged that a pellet from a ·177 air rifle had caused the death of one of three boys who had been playing "Cowboys and Indians." The injuries caused and the penetration of the projectile which was not found and had passed through the body of the deceased raised grave doubts, which were not satisfied until a ·32 Astra automatic pistol was found in a pond where it had been hidden after the fatality. The greater weight and energy developed by a bullet fired from such a weapon, with much greater potentialities, satisfactorily accounted for the serious and fatal injury caused. It is sometimes possible, even with smooth-bore air weapons, to relate a spent pellet to the barrel through which it had been fired.

Rifled arms usually have a much greater range than smooth-bore weapons and are subject to the provisions of the Firearms Act of 1937. Most rifles, apart from those of ·22 calibre, are designed for military purposes and as such are lethal at very considerable ranges. When correctly handled they are very accurate at these distances. On the early British ·303 S.M.L.E. rifle, although normally sighted to 2,000 yards, there were auxiliary sights for shooting at a maximum range of 2,800 yards. At the optimum elevation of the barrel, the maximum range to which the bullet would carry over a horizontal surface was in the region of 4,400 yards, or approximately 2½ miles. It will thus be seen that the danger to human life is very real. At the present time rifles and machine guns (which have similar potentialities) are not used at these extreme ranges and for military purposes, mortars and other forms of artillery are now used. The effective range of the modern self-loading rifle, firing a lighter bullet, is in the region of 500 yards. Some of the high-power sporting rifles for use against big game have similar characteristics to the military weapon, although in some cases the ammunition is different and expanding bullets may be used.

The ·22 calibre rifle is used in this country either for target purposes or, in some instances, for sport. As a target weapon at short ranges with modern ammunition it has been shown to be extremely accurate. Its effective range when used for sporting purposes is often not realised, particularly when the ammunition manufacturers only too clearly mark their packages to the effect that the cartridges are "dangerous within one mile." Instances occur of innocent persons being inadvertently shot, at ranges well beyond the target at which the sportsman is aiming.

In 1951 a boy of fifteen was killed by a bullet from a ·22 rifle which was being fired at rats and birds about 450 yards away. As recently as June, 1957, a man lying on the grass in a public park on the summit of a hill in the Midlands died from a bullet wound in the head which had come from a ·22 rifle fired in a field 700 yards away. In this case the deceased was not even visible to the firer as, due to the curve of the trajectory, the bullet had travelled over the summit before striking its victim.

Revolvers are essentially military weapons, although single-shot pistols are primarily intended for target work. These small hand arms have a limited accurate range and it is surprising how inaccurate a novice can be when using this type of firearm at a distance of some ten yards. For competition target use the maximum range is 50 metres in this country. It must not be thought, however, that these comparatively short distances are the limit of the weapon's capabilities. The German ·30 Mauser self-loading pistol, with butt attachment, is sighted to 1,000 metres and is quite accurate against man-sized targets at half that distance.

Metallic ammunition is always used in rifles, revolvers and pistols, owing to the higher pressures developed and to extraction problems. That used for most military rifles, machine guns and self-loading pistols has a lead-cored bullet, usually hardened with antimony and contained in an envelope of either cupro-nickel, gilding metal or coated mild steel. This envelope is necessary because of the higher velocities developed in these weapons. When striking hard objects, this casing will sometimes break up and all that may be found are fragments of the envelope and core. This type of cased bullet was of necessity adopted by the British Forces for use in the ·380 and ·455 service revolvers during the 1939–1945 war. Generally, however, revolvers fire a lead bullet and it is surprising that many revolver bullets do not always travel right through the bodies of persons shot. The military rifle bullet usually passes through the human body and is lost. The passage of bullets through glass windows produces a similar effect to those passing through bone, with a punched out entrance hole and a shelved or bevelled exit.

The manufacturers, types and sizes of metallic cartridges are legion and make an interesting study in themselves. Some military cartridges are loaded with what are known by the manufacturers as "fancy" bullets. These may be smoke or flame tracer, armour piercing, incendiary and, in some cases, explosive types. For identification purposes many of these cartridge cases and bullets are marked with symbols and colour codes to indicate the type. Some of the earlier smoke tracer and incendiary types contain phosphorus and should always, therefore, be treated and handled with due respect.

Self-loading or *automatic weapons*, which include self-loading pistols, machine pistols, machine carbines and true machine guns, are all in the same family. The mechanical features and operation are such that as the weapon fires, the fired cartridge case is automatically extracted and ejected in order to make way for a fresh loaded cartridge to be fed from a magazine into the chamber. At the same time the firing mechanism is re-cocked. It is only necessary, therefore, to release and re-apply pressure to the trigger to fire again with a self-loading pistol, or release the trigger to cease firing in the case of a fully automatic machine gun, providing, of course, that the magazine has not been emptied or there is a manually operated selector device to enable the weapon to fire single shots or automatically.

Where weapons of this kind have been used in crime, the position of the ejected cases should be noted as they will often fall in a defined area, according to the type of weapon used and how it was held. The fired cartridge case may be of use, when later examined at the laboratory, to assist in determining the kind of weapon used; some of which leave very distinctive marks upon the cases they eject.

With self-loading and automatic weapons it is often difficult to determine, without opening them, (1) whether they are loaded or (2) whether they are cocked, *i.e.*, ready to be fired, particularly when they are of the hammerless type. If, therefore, without thinking, an investigating officer opens the breech of one of these weapons found at the scene of a shooting, it is impossible to say later on whether the weapon was found cocked or not, because the act of opening in itself cocks the hidden hammer or striker. This only goes to show that firearms used in these circumstances are better not interfered with at all, until they can be properly examined by someone competent to do so.

Care of exhibits

Much has been written about the work which can be carried out in the laboratory and under the microscope, when photomicrographs are taken of minute striations on bullets or cartridge cases found at scenes of crimes. These are often positively matched with similar marks found on test cartridges fired in "suspect" weapons submitted for comparison.

It is not often appreciated, however, that much of this evidence can be destroyed or minimised if care is not taken with the handling of the exhibits before they reach the laboratory. The careless handling of arms before they are sent for expert examination and tests, can hamper the examiner in his work and place obstructions in his way which a little knowledge and care would have obviated. Fired bullets should always be carefully and individually packed before being sent for examination. If it rubs against the various impedimenta carried in some men's pockets, a fired "crime" bullet has got a good chance of losing its identity with the barrel through which it may have been fired.

The microscopic examination of cartridge cases and bullets is meticulous, painstaking, and exacting work, which requires patience and care, but the officer in charge of the case must not always expect a positive identification if, for instance, the bullet has been suddenly brought to rest by a brick or concrete wall. Not only will the wall be damaged, but the missile suffers gross damage and deformation which is apt to destroy completely the microscopic striations upon which identification is based.

A careful search should always be made for bullets fired from rifled arms, as well as for marks caused by them before they are brought to rest. Those found embedded in doors or woodwork must be carefully removed, whilst at the same time contact must be avoided between the bullet and any metal implements used for its removal.

It is always desirable that the officer in charge of a shooting case should, with the coroner's permission, be present at the autopsy. A great deal can be learned from these post-mortem examinations.

Bullets, pellets, wads and sometimes fired cartridge cases are often to be found in the clothing worn by dead persons and a careful search of bedding may also be rewarded with success. All relevant material or prospective exhibits should be carefully labelled (with a note where found) and properly packed before being submitted for examination, together with a report mentioning the points upon which help may be required.

In some cases the missile may have ricocheted before or after striking the victim, and with single missiles, such as bullets, these may travel more than once across a room before coming to rest.

In 1941, a dissatisfied customer fired at the licensee in the saloon bar of a licensed house. The bullet, from a ·450 revolver, travelled three times across the room, striking the base of a beer engine handle, the wall above the fireplace and the ceiling (twice) before being brought to rest by an iron table. During its flight, the bullet must twice have passed perilously close to the head of the accused customer, who could hardly have complained if he had been further charged with attempted suicide in addition to the major charge of attempted murder.

It is often desirable to arrange for a firearms expert to visit the scene of the shooting before articles are disturbed. In any case, no harm can be done if this step is taken and a clearer understanding of the circumstances should inevitably follow.

The investigation of shooting incidents is a most interesting study and, although by the very nature of the weapon used, cases fall into distinct groups, each one has its own variant from the pattern, or some peculiarity. This sets a problem for the investigator which in most cases should be capable of solution.

Appended is a list of some of the most important publications dealing with many aspects of weapons, their mechanism and effects, which will be of great use to a serious student of forensic ballistics.

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The Book for Police *

The *Book for Police* is, as the author tells us in his Preface, the concept of an experienced senior officer of the Metropolitan Police, Detective Chief Superintendent Robert Lee. Like many another experienced officer, he felt the need for a comprehensive library "for the instruction and guidance of the police officer throughout his whole career," a library, moreover, which should be designed alike for the village constable and the town policeman, and adapted both to meet his day-to-day professional needs and to guide him towards promotion. In a word, Mr. Lee envisaged a service manual, where none so far exists, in this country at all events.

The author, Mr. Alan Garfitt, a barrister of many years' standing, prudently sought the help, in giving reality to Mr. Lee's concept, of many senior police officers and civil servants whose work brought them into contact with police affairs. In this way, he felt, the whole basis of the book might best be broadened, and its structure strengthened, with emphasis being placed on practice rather than on theory. This objective, too, was in the author's mind when he decided against the temptations offered by what he calls "summary, paraphrase and footnote" in dealing with legal provisions, and chose rather to reproduce the relevant provisions in full in the text itself.

Much care has obviously been given to the arrangement of the various subjects into five volumes. The first deals with the English Legal System, Police History, Organisation and Practice, and Criminal Law. The second deals with what the author has chosen to call Administrative Duties and Sanctions. The third deals with Road Traffic Law, Evidence and Criminal Procedure. The fourth deals with General Information, Legal and Medical Terms, and First Aid; it also contains a comprehensive Index. The fifth provides a World Atlas, a Police Map of the British Isles, and a Gazetteer, and it also covers international police communications.

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* By Alan Garfitt, LL.B., Barrister-at-Law, published by The Caxton Publishing Co., Ltd., 5 vols., £12 7s. 6d. The publishers are intending to issue supplements from time to time to keep the work up to date.

The five volumes are well produced and clearly printed, though the size is certainly most unhandy. The cost is £12 7s. 6d., or £13 12s. 6d. on an instalment system spread over fifteen months. Each purchaser is offered a free issue of three Annual Supplements containing new matter, so that, at any rate for the first three years, the book may be kept up to date; after three years this service may be continued on a fee paying basis.

It is, of course, no real part of the reviewer's task to consider the merits or otherwise of an author's objective. He ought strictly to take that for granted, and confine himself to a consideration of the extent to which the author has achieved his objective. Nevertheless, Mr. Garfitt's attempt is so unprecedented, ambitious and all-embracing that it may not be out of place to offer a few observations on the soundness or otherwise of this concept of a service manual for the police, before commenting in detail on Mr. Garfitt's success in realising that concept.

One of the most interesting changes that have overtaken the police in this country since the last war has been the increased realisation on the part of police officers of belonging to a country-wide service. The boundaries of Loamshire or Ironville no longer limit our professional outlook. Many factors have gone towards making this change possible. One might mention the war itself, when so many police officers served in the armed forces, mixing with police officers from many different backgrounds. Then there have been the many subsequent opportunities police officers have had of serving with officers from other forces, either in missions to other countries or on the staffs of the Police College or the District Training Centres. Then, too, there has been the training itself at such institutions. And not least has been the fact that the very problems facing the police are to a far smaller extent confined within local boundaries; nation-wide problems have demanded nation-wide methods.

A natural result of this increased sense of belonging not only to a local force but also to a service may well be a consciousness of the lack of any real service manual. At the lowest level, of course, there is that admirable probationer's guide, *Moriarty*; excellent though it is, however, it has little relevance to the needs of the rank-holding officer. At a higher level, there are manuals such as *Archbold* or *Stone*, but these have little help to offer outside the limited fields of crimes and prosecutions. Then there are such books as the *Metropolitan Police General Orders* and the *Metropolitan Instruction Book*, with their self-evident limitations to the needs of the particular forces (and ranks) for which they are designed. There are, too, several pamphlets and booklets on specific subjects issued by the Home Office, which should earn their place on the library shelves of any police force. But nowhere has there been anything that can be described as a service manual—until now.

Is such a manual necessary? Many senior officers feel that there is a need, and plans for the preparation of a common Instruction Book have existed for some years. Furthermore, in recent years an increasing number of forces have produced Instruction Books in which they have incorporated what seems to be the best in other forces' Instruction Books. These books are increasing in number, and are acquiring an increasing similarity to one another, so that in time something very like a common Instruction Book may develop.

But the difficulty always seems to have been in deciding the scope of the book—not only what to put in and what to leave out, but also what level to aim at. As has been mentioned, the Metropolitan Police have frankly admitted this latter difficulty by having one book for the lower ranks, and one for the higher. As to the former difficulty, one would have to decide what aspects of police work demand uniformity of treatment. About some aspects there can, of course, be no doubt—the provisions of the criminal law, the Police Regulations, the Discipline Code and the historical background are a few examples. But about others, such as internal administration, or prosecution policy, there may be considerable doubt. Some may justify uniform treatment increasingly as time goes on, while others are better dealt with in a manner which takes due account of local requirements.

On the whole, therefore, there may well be a need for some kind of uniform service manual, offering authoritative guidance in those aspects of a police officer's work which justify a uniform approach throughout the police service. And probably, as uniformity of practice and procedure increases throughout the police service, the scope of such a publication could usefully be increased to cover new subjects. To this extent, then, Mr. Garfitt deserves the congratulations of all police officers, for his gallant attempt to fill this need.

But it is one thing to recognise the need for such a book and to congratulate the author who has tried to meet it. It is, alas, another and more difficult thing to say that the author has succeeded in his attempt. For unfortunately Mr. Garfitt's book has many defects which seriously limit its usefulness for the purposes for which it is designed. For one thing, as has been pointed out, it is not of handy size and design. If so much material were really desirable in one publication, it would probably have been better to have more volumes of a smaller and more easily handled size and shape. Subdivision in this way would in any case have allowed dissimilar subjects to have been kept to separate volumes, and such uneasy combinations as Organisation and Criminal Law, or Road Traffic Law and Criminal Procedure, to have been avoided. But in any case there seems to be an unnecessary width of scope, and much unnecessary material has been included. Many rare crimes, as will be seen later, as well as much of the contents of the fourth volume, for example, could have been omitted, with benefit both to the size of the publication and its price. Throughout the book there is evidence of careless checking. Several of the subjects are treated from too localised a point of view—perhaps the author relied excessively on advisers from the Metropolitan Police; indeed, as the Preface shows, every police officer whose assistance Mr. Garfitt sought was experienced in the Metropolitan Police methods, having served in that force at least for a considerable period. But perhaps it would be most useful to consider each volume in turn.

The first volume starts off extremely well, and the sections on the English Legal System and Police History are very good indeed, and most useful in giving a sound general background to a more detailed knowledge of a police officer's duties. The same cannot, however, be said of the chapters on Organisation and Practice. Some of the material here just is not of general application—for instance, instructions on the reporting of bugs in police buildings, buttoning of greatcoats, found property, accident report books and the parking of privately owned cars in station yards. Then there are some omissions which weaken the section. For instance, recent changes in pension arrangements and in the structure of the Federation and the Police Council are not mentioned. Errors, too, spoil this part—King's Police Medal for Queen's Police Medal, while it is some years since the two separate organisations of Chief Constables combined to form a single body. And although the subject of Crime Prevention is dealt with, it is by no means given the width of treatment and weight of emphasis it deserves. Here, indeed, is a good example of a subject requiring greater uniformity of treatment, and it is so regarded at the District Training Centres, where the instruction is based upon the report of the Working Party on Crime Prevention ; this report is not mentioned, nor are its detailed and most useful recommendations.

The rest of the first volume is quite well done, though one cannot but feel that the author has fallen between two stools in the way in which he has dealt with Criminal Law. The sections are set out in full, but the modifications produced by case law are omitted. The result is that the reader will have to go to other books if he wants to know what to do about particular facts. Then one might well criticise the actual selection of offences. For example, in a book with the aims claimed for this one, is it really necessary to devote so much space to such offences as share-pushing, damaging works of art, unlawful oaths, card-sharping, customs offences, Coroner's offences, false characters by servants, railway offences, telegram offences, assaulting a magistrate preserving a wreck, the abduction of nuns from a convent, and so on?

The second volume is a useful compendium of the day-to-day matters with which the police officer has to deal, though there are some subjects which one might wish were dealt with more fully. For instances, the Visiting Forces Act of 1952 ; while the useful section 4 of the Small Lotteries and Gaming Act of 1956 is not mentioned. On the other hand, the section on Clubs is very good. It is, incidentally, particularly in this volume that one could wish for a contents or index to subjects for each volume. The general Index in the fourth volume is excellent, but the eager researcher can spend much time, after finding the right volume, in then finding the right page. It would help, too, if the subjects were arranged in alphabetical order.

The third volume, covering Road Traffic Law, Evidence and Criminal Procedure, is quite well done on the whole, though this combination has little merit. One would have expected Evidence and Criminal Procedure to have been better associated with Criminal Law (first volume). Road Traffic Law would have then been on its own—or perhaps even omitted, since it is a subject which is already admirably covered by another publication, with which this section can hardly compete. This Road Traffic section has two main defects—there is a great deal of unnecessary reproduction of traffic signs, and it is far too hard to amend, and this is a subject which often is amended. Here again, an additional index to the volume would be invaluable. The sections on Evidence and Criminal Procedure, on the other hand are very well done indeed, though the author is somewhat weak in his law when dealing with police prosecutions.

The fourth volume contains a good deal of material which could well have been left out. For example, the Medical Glossary, and much of the General Information. Many of the items in the latter part are so readily available to the police officer that it seems an unnecessary extravagance to include them in a book such as this; it is comprehensiveness carried to excess. In any event, lists of this kind really attain usefulness only when they can be relied on; but a list of abbreviations which contains L.P.T.B. but not L.T.E., or which contains A.M.G.O.T. but not N.A.T.O., or Esq. but not C.G.M., cannot be relied on. As to the First Aid Section, here again it is admirably done, but far less convenient in form than the standard small books so readily available. Why include it? The Index to the series of volumes, which is at the end of this volume, seems very thorough; but as has been pointed out, it cannot take the place of a list of contents in each volume.

The fifth volume, containing the World Atlas, the Police Map of Great Britain and the Gazetteer, really does seem to be unnecessary. The World Atlas is not better than any school atlas one can borrow from the children's room at home. The Gazetteer is an attempt to list every named place in England, Scotland and Wales, and to tell the reader the name of the local police station, whether it is an Inspector's, a Sergeant's or a Constable's station, the name of the police division it is in, and the county, or rather the force area. But it is incomplete, and in any case the information it purports to offer is available elsewhere.

Looking once again, then, at the publication as a whole, the idea behind it is admirable. In many respects its execution is excellent. But it has serious defects. In size and price, it is a little too much of a good thing. A new edition, one supposes, is too much to hope for. But if such a thing were possible, the publishers and the author might do well to start again, perhaps a little less ambitiously. Smaller volumes, more easy to handle, rearranged material, considerable omissions, somewhat less emphasis on the way they do things in the Metropolitan Police, and a lower price, might produce a really valuable service manual to meet what is undoubtedly a growing need.

T. C. W.

Practice and Procedure

Costs

Costs of successful appeal to quarter sessions against sentence only awarded against police—whether discretion as to costs exercised judicially

In ALLEN *v.* MAIDSTONE SACK AND METAL CO.[1] (Divisional Court: Queen's Bench: Lord Parker C.J., Donovan and Ashworth JJ.: February 3, 1959) the respondents, having been served with two summonses for offences against the Motor Vehicles (Construction and Use) Regulations, 1955, made under the Road Traffic Act, 1930, adopted the procedure provided by the Magistrates' Courts Act, 1957, and wrote to the court pleading guilty to both charges and requesting the justices to dispose of the cases in their absence. The justices fined the respondents £20 on each summons, having taken into account the mitigating circumstances contained in the respondents' notice of plea of guilty. The respondents, who of course had not been represented before the justices, appealed against the fines to the Appeal Committee of the West Kent Quarter Sessions relying upon further mitigating circumstances. The Appeal Committee reduced the fines to £10 and £2 respectively and ordered the appellant, a chief inspector of the Kent Constabulary, to pay to the respondents the sum of 20 guineas as costs of the appeal, being of the opinion that as the amount of the penalties was the only matter in issue before them, it was just to order the police to pay the costs of the appeal.

Held, that the Appeal Committee could not have made such an order for costs against the police in a proper exercise of their judicial discretion for there were no facts which the Committee were entitled to take into consideration which would have justified such an order. The appeal against the order for costs would therefore be allowed.

Commentary. By section 1 of the Summary Jurisdiction (Appeals) Act, 1933, quarter sessions has a discretion to make " such order as to costs to be paid by either party as they think just," but as in the case of the exercise of other judicial discretions, such a discretion must be exercised judicially. In this case the Divisional Court held that the order for costs made against the police could not have been so made.

[Reported by A. H. BRAY, *Barrister-at-Law*.]

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[1] For the appellant: Victor Durand, Q.C., T. K. Edie (instructed by Sharpe, Pritchard & Co., for N. K. Cooper). For the respondents: Michael Parker (instructed by Angles and Court).

Summary Justice

Road traffic

For using a lorry bearing limited trade licence plates for purposes other than trade, contrary to reg. 30 of the Road Vehicles (Registration and Licensing) Regulations, 1955, Grange Motor Co. (Ramsey), Ltd. were fined £2. A fine of £2 was imposed on the driver of the lorry for failing to produce a copy of the entry in the L.T. book as required by the same regulation. Ramsey Magistrates' Court (*Peterborough Citizen and Advertiser,* March 13).

Case and Comment *

CHILDREN

Child under fourteen—rebutting presumption of innocence

Ex parte N.

Queen's Bench Divisional Court: Lord Parker C.J. and Hinchcliffe J.: *The Times,* March 21, 1959.[1]

N., a boy aged 12, was convicted of stealing certain goods from a shop. His conviction was upheld by the appeals committee of Middlesex Sessions, although it was submitted on his behalf that there was no evidence to rebut the presumption that he was incapable, by reason of the fact that he was less than 14 years old, of committing the crime. The chairman of the committee said that there was matter before the committee to rebut the presumption of innocence: N. and his father were well dressed, and the father had had the wisdom to brief distinguished counsel, thereby indicating that N. had been well brought up. N. now applied to the Divisional Court for leave to move for an order of mandamus directing the chairman and members of the committee to state a case for the opinion of the Divisional Court, which they had previously refused to do.

Held, that having regard to the statement made by the chairman, leave would be granted. [D. C.]

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* Reported, unless otherwise stated, by David Calcutt and Henry Palmer, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the applicant: *Victor Durand, Q.C., David Fairbairn* and *Clive Nicholls* (instructed by Messrs. Carters).

Commentary. In the case of a child between eight and fourteen years of age the prosecution must prove, in addition to the *mens rea* of the crime, that the child knew that the act he did was wrong. The evidence relied on by the chairman would seem, with respect, to have no relevance to that issue.

COSTS

Costs of successful appeal against sentence awarded against police —whether discretion as to costs exercised judicially

See ALLEN *v*. MAIDSTONE SACK AND METAL CO., p. 356, *ante*.

EVIDENCE

Character of witness attacked—cross-examination of defendant as to previous convictions—discretion of judge

R. v. Cook

Court of Criminal Appeal: Lord Parker C.J., Devlin, Donovan, McNair, Hinchcliffe JJ.: March 23, 1959: *The Times*, March 24, 1959.[2]

C. was convicted at quarter sessions of obtaining goods by false pretences and receiving stolen property. At the trial a police officer gave evidence of a written statement made by C.; and C., who was unrepresented, suggested to the officer that the statement had been obtained by means of a threat, that if he (C.) did not speak his wife would be charged. The police officer denied this allegation. C. repeated the allegation when he was cross-examined, and counsel for the prosecution then said that he wished to put "certain further questions." The chairman said that while he (counsel) was strictly entitled to do so, he (the chairman) would have thought it unnecessary. Counsel for the prosecution then cross-examined C. as to his previous convictions. On appeal to the Court of Criminal Appeal on the question of the admissibility of the cross-examination as to previous convictions:

Held, that the questions put to C. as to his previous convictions were admissible under the Criminal Evidence Act, 1898, only if the nature or conduct of the defence was such as to involve imputations on the character of the police officer. The difficulty about this provision was that, unless the words were given a restricted meaning, the prisoner's bad character would emerge almost as a matter of course, for example, if it were suggested that a witness for the prosecution was untruthful. The courts had tried to surmount this difficulty in two ways, first, by construing the words of the statute benevolently and, secondly, by laying down that the judge must exercise a discretion to disallow such evidence where its prejudicial effect was out of all proportion to its evidential value. In the present case this court was of opinion that there had been an attack on the character of the police officer. The matter was therefore one of discretion and this court was not satisfied that the chairman had exercised his discretion at all, because he had thought that the prosecution were entitled to put the questions as of right. Further, it was the invariable practice to warn the prisoner (and especially necessary when he was unrepresented) that he was going too far. Although, therefore, the evidence was inadmissible the court would dismiss the appeal on the ground that there had been no substantial miscarriage of justice. The case against C. was overwhelming and, accordingly, the proviso to section 4 (1) of the Criminal Appeal Act, 1907, would be applied. [H. P.]

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[2] For the appellant: *N. R. Blaker* (instructed by Messrs. Fryer, Bennett & Deal, Weston-super-Mare): For the Crown: *John Inskip* (instructed by the Registrar, Court of Criminal Appeal).

Commentary. It is well established that an accused charged with rape may, without exposing himself to cross-examination as to his own character, set up the defence that the prosecutrix (who is called as a witness) consented to the act of intercourse, and may even allege that prior to the intercourse, she committed a gross indecency with him: *R.* v. *Sheean* (1908) 72 J.P. 232; *R.* v. *Turner* [1944] K.B. 463. The justification advanced for this rule is that "What is commonly referred to as the defence of consent in rape is, in truth, nothing more than a denial by the accused that the prosecution has established one of the two essential ingredients of the charge. It is and must be the prosecution which introduces the question of consent or no consent."

If this rule were followed in cases other than rape the logical principle would seem to be that, where the attack on the prosecution witness is relevant merely to show that he is not to be believed on his oath (as in *R.* v. *Jenkins* (1945) 31 Cr.App.R. 1) then the prisoner too may be cross-examined as to his character; but that, if this attack is relevant to establish a defence to the charge, then the accused is protected from cross-examination as to his character. Lord Simon seems to have recognised the existence of some such general principle in *Stirland* v. *D. P. P.* [1944] A.C. 315, 327, when he said: "An accused is not to be regarded as depriving himself of his protection of the section, because the proper conduct of his defence necessitates the making of injurious reflections on the prosecutor or his witnesses." Other decisions of the Court of Criminal Appeal are, however, hardly reconcilable with such a principle; for it has been held that an accused loses the protection of the section when, being charged with theft, he alleges that a prosecution witness was the real thief (*R.* v. *Hudson* [1912] 2 K.B. 464) or where he alleges that a confession which has been tendered in evidence was obtained from him by the police by bribery (*R.* v. *Wright* (1910) 5 Cr.App.R. 131) or was concocted by the police (*R.* v.

Clark [1955] 2 Q.B. 469). The present case is a further obstacle in the way of such a general principle and it seems, therefore, that the rape cases must be regarded as exceptional. *Cf. R.* v. *Cunningham* [1959] Crim.L.R. 126.

For a vigorous criticism of the present law, see Glanville Williams, *The Proof of Guilt*, 2nd ed., 186 *et seq.*

Written statement of prosecution to police—right of defence to inspect

R. v. Hall and Others

Central Criminal Court: Mr. Commissioner Maude: November 12, 13, 14, 1958: 43 Cr.App.R. 29.[3]

H., B., R. and S. were charged, H. and S. with assaulting a peace officer in the execution of his duty, and H., B. and R. with causing grievous bodily harm with intent and assault occasioning actual bodily harm. Before the jury were sworn, counsel for B. applied to be allowed to see statements made by certain prosecution witnesses to the police, and cited *R.* v. *Clarke* (1930) 22 Cr.App.R. 58 at pp. 60, 65, and section 5 of the Criminal Procedure Act, 1865. The application was refused. The application was subsequently renewed, when a reference to *R.* v. *Xinaris* in [1955] Crim.L.R. 587, a note of counsel of *McClean and McGing* (unreported) (April 22, 1955: Central Criminal Court: Mr. Commissioner Maude ruled that the prosecution should allow the defence to inspect a statement of a prosecution witness for the police) and *R.* v. *Bryant and Dickson* (1945) 31 Cr.App.R. 146, were cited.

Held, that the prosecution should allow counsel for the defence to inspect the statements of certain prosecution witnesses for the police, but that this was not to be regarded as laying down any general rule. [H. P.]

Commentary. Under section 5 of the Criminal Procedure Act, 1865, a witness may be cross-examined as to previous statements made by him in writing or reduced into writing, without such writing being shown to him. The judge may require the production of the writing for his inspection and may make such use of it for the purposes of the trial as he thinks fit.

In *R.* v. *Clarke* defending counsel wished to cross-examine a prosecution witness to show that the description of the accused which the witness had given at the trial was not the same as he had given to his superior officer. Prosecuting counsel at first took the attitude that the written description could not be produced because it was a confidential document and it would be contrary to police regulations for the officer to produce it. Eventually he agreed to allow defending counsel to look at it, though the offer was not, in the end, taken up. In the Court of Criminal Appeal, Humphreys J. said in argument, that the defence was entitled to see the documents, and Avory J., delivering the judgment of the court, described defending counsel's attitude as "unfortunate."

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[3] For the defendant B.: *M. D. L. Worsley* (instructed by the court).

HABEAS CORPUS

Application to Chancery Division of High Court—not a separate court from Queen's Bench Division—no right to be heard twice

Re Hastings (No. 3)

Chancery Divisional Court: Vaisey and Harman JJ.: *The Times*, March 6 and 7, 1959.[4]

The applicant, who had twice applied to a Queen's Bench Divisional Court for a writ of habeas corpus, which had on both occasions been refused ([1958] Crim.L.R. 332, 687; [1959] Crim. L.R. 125), now applied upon identical grounds to a Divisional Court of the Chancery Division.

Held, that since the Judicature Act, 1873, there was no separate courts of Chancery and Queen's Bench, but one High Court. The decision of the Queen's Bench Divisional Court was the decision of the High Court, and since the two divisions were only part of the same court, the old rule that an applicant for habeas corpus might go from court to court had nothing to do with the matter. The right to go from judge to judge existed only in vacation, when no court was sitting. Accordingly, the applicant had no right to be heard again.

Per Harman J.: It would be a good thing if there were some means of taking a case like this to the House of Lords. [D. C.]

Commentary. In *Re Hastings* (*No.* 2) the Queen's Bench Divisional Court held that an applicant could not apply twice to the *same* division of the High Court but left open the question whether a Divisional Court of one division would have jurisdiction to hear an applicant who had failed in another division.

In non-criminal matters a person who alleges that he is illegally detained may appeal to the Court of Appeal and the House of Lords from the ruling of a Divisional Court. The present decision emphasises the anomaly arising from the provision in section 31 of the Judicature Act, 1925, that no appeal shall lie to the Court of Appeal in any criminal cause or matter. It is submitted that there is a strong case for the amendment of that section to permit an appeal from the refusal of habeas corpus in a criminal cause.

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[4] For the applicant: *Neil Butter* (instructed by the Official Solicitor). For the Crown: *Sir Harry Hylton-Foster, Q.C., S.-G.*, and *Rodger Winn* (instructed by the Treasury Solicitor).

Postponement of proceedings—absence of complainant—application by the Crown under section 6 of the Habeas Corpus Act, 1679

R. v. Campbell

Liverpool Crown Court: Recorder, Judge Laski: March 17, 1959.[5]

The accused was committed to the Liverpool Crown Court by the Liverpool magistrates on December 11, 1958, on a charge of robbery with aggravation. Two other accused pleaded " guilty " and were sentenced. Campbell pleaded " not guilty."

Counsel for the prosecution applied in January, 1959, to respite the case to the February session on the ground that the complainant was out of the country. The Recorder granted the application. The accused was allowed bail. A similar application was granted in February and bail was extended. A third application was made in March. It appeared that the complainant would not be in this country until July.

Held, section 6 of the Habeas Corpus Act, 1679, did not apply, since the application before the court was made by the Crown and not by the prisoner, and the procedural conditions precedent of the Act of 1679 had not been complied with. The court had a discretion to direct the future of the case. The case was ordered to lie on the file and be not proceeded with without an order of the court.

Per Judge Laski: " The Habeas Corpus Act of 1679 was cited to me as having immediate relevance. I was referred to §§ 241–243 of Archbold as providing an adequate summary of section 6. Under the Assizes Relief Act, 1889, if a person committed for trial at sessions is not tried at the next sessions, the next Court of Assize may on his application try or discharge or release him on bail, unless the delay is due to special reasons, such as the impossibility of producing the witnesses for the Crown (s. 3 (i) (iii)). If the next court of quarter sessions has not tried him before the next subsequent assizes, the judge of assize must try or discharge him (s. 3 (ii)).

" The offence in respect of which Campbell is indicted is not triable at quarter sessions (Quarter Sessions Act, 1842, s. 1).

" The Liverpool Crown Court has functions both for the purpose of exercising such jurisdiction as is commonly conferred on courts of assize by the commissions of oyer and terminer and gaol delivery (section 1 (i), Criminal Justice Act, 1956) and in that capacity it is known as the 'Crown Court at Liverpool' and it also, under section 3 of the same Act, has additional jurisdiction as a court of quarter sessions for Liverpool. It is clear that I must deal with this matter in the context of section 1 of the Act constituting this court.

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[5] For the prosecution: *George Bean* (instructed by the Town Clerk, Liverpool). For the defence: *J. M. Dovener* (instructed by K. Maxwell Brown).

"The Central Criminal Court was constituted in 1834 by an Act of that year. It took the place of the former sessions at the Old Bailey which had been held from very early times under special commissions of gaol delivery for Newgate and oyer and terminer for the City of London and the County of Middlesex.

"The court now sits under a general commission of gaol delivery and oyer and terminer and has power to proceed thereunder until the commission is renewed (section 2). The court sits eleven times a year. In these respects the Central Criminal Court is *in pari materia* with this court. The Central Criminal Court is part of the High Court of Justice (Supreme Court of Judicature (Consolidation) Act, 1925, ss. 18 and 70; and see note (g), Halsbury, *Laws of England*, volume 9, at page 407). It is a court of assize also (see Interpretation Act, 1889, s. 13 (4)). In my view the definition of assizes in that subsection would include this court.

"I do not feel that section 6 of the Act of 1679 is as easily construed as the simplicity of the explanation in Archbold would suggest. Sir William Holdsworth, at page 118 of volume 9 of his *History of English Law*, also gives a very simple summary of section 6, but fails in my respectful opinion to note the procedural conditions precedent which find an echo in the Assizes Relief Act cited above.

"This is an old Act conditioned in its terms by the law and procedure of its day. In *Ventris Reports* at page 346—a black-letter folio volume—I have found an anonymous case heard in Hil. Anno 31 & 32 Car. II in B.Rs., that is, in Banc in the King's Bench in Hilary Term of 1680, within a year after the passing of the Act.

"The report runs as follows: 'A person who was committed to the Tower for conspiring the death of the King was brought up by Habeas Corpus and prayed to have bail taken unless an indictment were found against her this term, according to the new Act of 31 Car. II for Habeas Corpus. The court said that they which would have the benefit of that Act must pray it before the first week of the term expires; but in regard it appeared that she had prayed it before by her counsel and her Habeas Corpus was taken out in time, the court said the benefit of the Act should be saved to her, for the prayer is not necessary to be made in person, but

Mr. C. G. was refused the advantage, he having omitted to make the prayer during the first week either in person or by counsel.'

"In volume 8 of the *Statutes at Large*, edited by Danby Pickering and published in Cambridge in 1763, the Act is printed at page 432. The present notation of the relevant section is 6. In Pickering it is 7. It is clear that the anonymous Ventris case was regarded as good law as it is therein marginally cited. I do not regard *R.* v. *Bowen* (1840) 9 C. & P. at page 509 as of great value to me, but it shows that it was recognised that the benefit of the Act of 1679 depended on the observance of certain procedural conditions precedent.

"It may be that it is in terms of today difficult if not impossible to comply with the requirements of the statute. That may be an argument of validity and force for amending or reconstructing the law of habeas corpus, but I must construe the Act of 1679 as it is.

"In the first place this application is made to me by the Crown and not by the prisoner. In the second the procedural conditions precedent of the Act of 1679 have not been complied with. In these circumstances I hold that no case exists for the application of the Act of 1679.

"The preamble to the Act makes clear the abuses aimed at which do not obtain in modern times. The decision of Williams J. in *R.* v. *Bowen* accords with the common sense of the matter.

"The case of *R.* v. *Oliver* (1958) 42 Cr.App.R. 27, which was cited, does not assist. I can find no evidence of a matter arising *in pari materia* with this matter before me from which in terms of its treatment *aliunde* I could gain guidance.

"I note with interest that in the learned article on 'Habeas Corpus' which appeared at page 468 of volume 6 of the second (1907) edition of the *Encyclopaedia of the Laws of England*, edited by Renton and Robertson, it is stated at page 470 'at the present day the writ of habeas corpus is almost invariably issued by virtue of the common-law jurisdiction, and not under the statute.'

"Campbell is not without remedy. I conceive myself within the law to have a discretionary power to give a direction as to the future of this matter. The justice of the case will be met if I order that this case lie on the file and be not further proceeded with without an order of the court."

[PETER SMITH, *Barrister-at-Law.*]

Commentary. The conditions laid down by section 6 would seem to be that the accused must pray or petition in open court in the first week of term or the first day of the sessions of oyer and terminer and general gaol delivery to be brought to his trial and, if he is not so brought before the last day of the term or sessions, on that day either the prisoner or someone on his behalf must move in open court that he be released on bail; whereupon he must be released unless it appears to the court that the witnesses for the Crown could not be produced during the term or sessions. Where this procedure has been followed and the prisoner is not indicted and tried in the second term or sessions after his commitment, he must be released.

In *R.* v. *Bowen* Williams J. declined to discharge the prisoner under the section although he had not been brought to trial during the second session after his commitment. In that case no application had been made on the first day of the assizes but his counsel argued that that was no reason for " ousting him of the benefit of such a provision, which ought to be liberally construed in favour of personal liberty." Counsel pointed out that " it is the constant practice to do no criminal business on the first day of the assizes, and prisoners are never brought into court on that day, and have, therefore, on that day no opportunity of applying." Williams J. gave no very clear reason for his decision but, as he said " [the Habeas Corpus Act] is a human law and must be humanly interpreted," it may be presumed that his opinion was that on its true construction the Act did not apply in that case.

The law as stated in all the books would seem to agree with the statements in Archbold and Holdsworth which the learned judge rejected as an over-simplification of the position. *Cf.* Wade and Phillips, *Constitutional Law*, 5th ed., 376; Hood Phillips, *Constitutional Law*, 2nd ed., 496; Kenny, *Outlines of Criminal Law*, 17th ed., 565. The present case shows that the Act affords a much less effective guarantee of a speedy trial than has been thought and the judge's comment that it may be " difficult if not impossible to comply with the terms of the statute " seems, with respect, to be fully justified. Clearly insistence on strict compliance with the Act's procedural requirements denies any remedy to a prisoner who expects to be, but is not, brought to trial during the first session after his commitment.

The Assizes Relief Act makes provision for the speedy trial of persons committed to quarter sessions on charges of felony or misdemeanour. It has been pointed out by Wade and Phillips (*op. cit.*) that, " curiously there is no similar provision in respect of misdemeanants committed to Assizes." It now appears that, in effect, there is no similar provision in respect of persons charged with felony or treason and committed to assizes either. This is surely an indefensible anomaly which should be remedied.

HOMICIDE

Murder—plea of insanity—evidence called to rebut plea and to establish diminished responsibility

R. v. Nott

Bedfordshire Assizes: Elwes J.: (1959) 43 Cr.App.R. 8.[6]

The prisoner was charged with murder, and the defence was that he was, at the time of the commission of the offence, insane within the meaning of the M'Naughten Rules. The defence called one medical witness to establish this, who was cross-examined by the prosecution. At the close of the case for the defence, the prosecution sought leave to call medical evidence rebutting this defence, and tending to establish that the prisoner was suffering from diminished responsibility within the meaning of section 2 (1) of the Homicide Act, 1957. The defence did not resist this application.

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[6] For the prosecution: *Graham Swanwick, Q.C.* and *Nigel Robinson* (instructed by the Director of Public Prosecutions). For the defence: *J. A. Grieves, Q.C.* and *J. R. T. Hooper* (instructed by Messrs. E. T. Leeds Smith & Co., Sandy).

Held, that leave would be given to call the rebutting evidence.

[D. C.]

Commentary. In *R.* v. *Bastian* (1958) 42 Cr.App.R. 75, it was held that where the accused sets up the defence of diminished responsibility the prosecution is entitled to cross-examine to prove that the degree of abnormality is such as to amount to insanity and to call evidence to that effect. The strange result is that the prosecution is contending for what is technically a verdict of acquittal: *Felstead* v. *R.* [1914] A.C. 534. The decision was, nevertheless, a realistic one for it may well be in the public interest that the prisoner should be detained in Broadmoor during Her Majesty's pleasure whereas, from the prisoner's point of view, a verdict of manslaughter on the ground of diminished responsibility may well be preferable. The anomalous nature of the decision in *Bastian* is emphasised by the present case, where the roles of prosecution and defence are reversed.

Non-capital murder—death in struggle—extent to which jury must be directed on provocation and self-defence

R. v. Rafik

Court of Criminal Appeal: Lord Parker C.J., Devlin and Donovan JJ.: March 9, 1959: *The Times,* March 10, 1959.[7]

R. was convicted at the Central Criminal Court of non-capital murder. At the trial the case for the prosecution was that R. had attacked one P. with a knife and had stabbed him in the stomach and elsewhere with the result that he died a week later. The case for the defence was that the defendant had been attacked by P. with the knife and that, in the course of the struggle, P. had been accidentally stabbed. In cross-examination R. had denied that there was any question of self-defence or provocation. R. appealed to the Court of Criminal Appeal on the ground that the jury should have been directed on the defences of self-defence and provocation.

Held, dismissing the appeal, that where there was any evidence upon which a verdict of manslaughter as a result of provocation could be returned, the authorities (*R.* v. *Hopper* [1915] 2 K.B. 431 at p. 435; *Mancini* v. *D. P. P.* [1942] A.C. 1; and *Kwaku Mensah* v. *The King* [1946] A.C. 83) showed that the matter must be left to the jury whether or not the defence of provocation, or self-defence, had been raised. This court wished to say nothing which would restrict or be treated as criticism of those cases, but, in the opinion of the court, the matter did not arise in this case at all. The jury had been rightly directed that there were two explanations of P.'s death, one that R. deliberately stabbed P., the other that P. had been accidentally stabbed in the course of the struggle. The jury had then been told: "Before you convict, the prosecution have to satisfy you completely that the first is the true explanation, and they have also to negative completely the second explanation." Thus, on the way in which the matter was left to the jury it became unnecessary for them to be directed as to the alternative view of manslaughter as the result of provocation or self-defence. Accordingly, the appeal would be dismissed. [H. P.]

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[7] For the appellant: *Roderick Bowen, Q.C., Denis Henry* (instructed by Messrs. Oswald Hanson & Smith). For the Crown: *Christmas Humphreys* (instructed by the Director of Public Prosecutions).

Commentary. The court treated the verdict of the jury as a finding of fact that R. attacked P. If R. was the attacker, obviously self-defence was negatived and the only evidence capable of amounting to provocation—that P. attacked R.—was rejected.

MAGISTRATES' COURTS

Error in record sent to quarter sessions on committal for sentence —certiorari—conviction good.

R. v. Huntingdon and Leightonstone Justices, ex p. Simpkin & Coombes

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Ashworth JJ.: January 19, 1959.[8]

A and B were charged before justices with stealing a Bedford lorry spare wheel, the property of the M. motor company, contrary to section 2 of the Larceny Act, 1916. They were charged alternatively with receiving the property. Both offences were alleged to have taken place on the same day. A and B were acquitted of stealing but convicted of receiving and the justices made an order committing them to quarter sessions for sentence. In making the entries in the register, as required by rule 54 of the Magistrates' Courts Rules, 1952, the clerk made the appropriate entries in respect of the acquittal but, in making the entry relating to the conviction, instead of entering in the appropriate columns the names of the applicants and the date of the offence he wrote "ditto." He also omitted to state the owner of the property which was the subject of the charge and, moreover, stated that the committal to quarter sessions was under section 29 of the Criminal Justice Act, 1948, instead of section 29 of the Magistrates' Courts Act, 1952. Copies of both entries were sent forward to quarter sessions. A and B applied for an order of certiorari to quash the record relating to the conviction.

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[8] For the applicants: *J. Yahuda* (instructed by Edward Davis, Nelson & Co.). For the Crown: *W. H. Hughes* (instructed by Hunnybun & Sons, Huntingdon).

Held, that the errors were of such a nature that the record must be quashed so that the copy sent forward to quarter sessions became a nullity. As the position would then be that there was a good conviction but no entry in the record it became the duty of the magistrates' clerk to make a fresh and proper entry which could be sent forward to quarter sessions. In the circumstances no order other than the order of certiorari to quash the entry relating to the receiving charge was necessary. [Mrs. E. M. WELLWOOD, *Barrister-at-Law*.]

Commentary. The entry in the register neither makes nor contributes to the making of the conviction, which is complete as soon as it is announced by the magistrate in court: *R.* v. *Sheridan* [1937] 1 K.B. 223; *R.* v. *Manchester Justices, ex p. Lever* [1937] 2 K.B. 96; *R.* v. *Campbell, ex p. Hoy* [1953] 1 Q.B. 585. Thus it was possible to quash the record and to leave the conviction standing.

MINES

Mines and Quarries Act, 1954, *s.* 48—*test of foreseeability*

Wright v. Jenkins

Nottinghamshire Quarter Sessions: T. R. Fitzwalter-Butler, Esq., Chairman: (1959) Cr.App.R. 17.[9]

A fall took place from the roof of a working place in a coal mine, with fatal results. As a result, the manager of the mine and other persons were convicted in the magistrates' court of offences under section 48 of the Mines and Quarries Act, 1954. Upon appeal, it was contended on their behalf that section 48 does not impose an absolute liability which is incurred by the mere fact that a fall has occurred. Section 48 provides:

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[9] For the appellants: *A. P. Marshall, Q.C.* and *Nigel Robinson* (instructed by Messrs. Shacklock, Bosworth & Hooton, Sutton-in-Ashfield, and by Messrs. Rothera, Sons & Langham, Nottingham). For the respondent: *J. A. Grieves, Q.C.* and *Geoffrey Lane* (instructed by Messrs. Wells & Hind, Nottingham).

> "(1) It shall be the duty of the manager of every mine to take, with respect to every . . . working place in the mine, such steps by way of . . . supporting the roof . . . of the . . . working place as may be necessary for keeping the . . . working place secure."

Held, allowing the appeal, that construing the Act as a whole, and having regard to the fact that the section is worded differently from corresponding sections in earlier statutes which undoubtedly did impose absolute liability, the duty was only to take such steps as a competent manager, in the light of his own experience and in the light of generally accepted mining practice, would have taken. If the manager failed to take any of those steps, he would be guilty of an offence under the section.

Per curiam: This section introduces the test of foreseeability.

[D. C.]

Commentary. The section seems to have been construed as one imposing liability for negligence rather than as requiring *mens rea* in the strict sense. The test laid down in the present case is not what the accused foresaw but what a reasonable man in his position would have foreseen. Thus the learned chairman said: "It is not, of course, an answer to [*sic*] a manager to say: 'I personally did not foresee the particular danger that arose'; but there is a test of foreseeability. . . ." *Cf. R.* v. *Cunningham* (1957) 41 Cr.App.R. 155, a case in which *mens rea* in the strict sense of foresight *by the accused* was required.

ROAD TRAFFIC

Motor Vehicles (Authorisation of Special Types) General Order, 1955, art. 18—two tractors carrying one load—number of vehicles

Dixon v. B.R.S. (Pickfords), Ltd.

Queen's Bench Divisional Court: Lord Parker, C.J., Donovan and Ashworth JJ.: [1959] 1 All E.R. 449.[10]

The respondents transported a heavy load, consisting of a cylinder exceeding in width nine feet six inches, by the following means: the cylinder was mounted on bogies at each end, and to each of the bogies there was attached a motor-tractor. There were never less than four men, including the drivers of the two tractors, in attendance on the load. The respondents were charged in the magistrates' court with committing an offence under Article 18 (1) of the Motor Vehicles (Authorisation of Special Types) General Order, 1955, which provides:

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[10] For the appellant: *J. P. Widgery, Q.C.* and *N. C. Bridge* (instructed by Messrs. Sharpe, Pritchard & Co. for Town Clerk, Leeds). For the respondents: *J. D. May* (instructed by Messrs. Goldingham, Wellington & Co. for Messrs. Morrish & Co., Leeds).

" Where the overall width of any vehicle, the use of which upon roads is authorised by this part of this order, and its load or of the vehicle or its load exceeds nine feet six inches, at least three persons inclusive of the driver or drivers shall while the vehicle is being driven be in attendance to attend the vehicle and load. . . ."

The stipendiary magistrate was of opinion that the motor tractors, together with the cylindrical section and the bogies, formed one vehicle within the meaning of the Article, and that as not less than three men had been in attendance upon it at all times, no offence had been committed. The prosecution appealed.

Held, that the word " vehicle " in the Article could not be construed to mean " vehicles or combination of vehicles," and that the case must go back to the stipendiary so that he might find as a question of fact how many vehicles the arrangement consisted of.

[D. C.]

Commentary. From the fact that the Article uses the term " driver or drivers " the magistrate inferred that the term " vehicle " must mean " vehicle or vehicles," arguing that a single vehicle can be driven only by one person at a time. But, as counsel for the appellant pointed out, section 17 (1) of the Act under which the Order was made (the Road Traffic Act, 1930) contemplates the possibility of a single vehicle having two drivers. Moreover, other Articles of the Order refer specifically to a combination of vehicles and there is no such reference in Article 18.

SENTENCE

Prisoner given option of short sentence of imprisonment or longer sentence of corrective training

R. v. Funnell

Court of Criminal Appeal: Lord Parker C.J., Devlin and Donovan JJ.: March 10, 1959: *The Times,* March 11, 1959.[11]

F. was convicted at a magistrates' court of obtaining money by false pretences and committed for sentence to quarter sessions.

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[11] The applicant did not appear and was not represented. The Crown was not represented.

F., who was a man of twenty-six years of age, had previous convictions making him eligible for corrective training; and the prison commissioners had reported that he was suitable for corrective training and would, in their view, derive considerable benefit from a period of discipline and training. The chairman of quarter sessions said that the proper penalty for the present offence, taking into account F.'s record, was a sentence of eighteen months' imprisonment and, as the minimum sentence of corrective training was three years, he would give F. the option of three years' corrective training or eighteen months' imprisonment. F. chose the latter and was accordingly sentenced to that term of imprisonment. On application for leave to appeal against sentence to the Court of Criminal Appeal:

Held, that (i) it would often happen that the last offence in a series of offences would not, if looked at alone, justify a three year sentence, but the purpose of such training was to redeem the offender while there was still hope. Accordingly, unless the last offence was so trivial that it ought not to attract such a sentence (as, for example, in *R.* v. *McCarthy*, 39 Cr.App.R. 118), a longer period would be frequently required than the offence considered by itself, would warrant. And (ii) the proper course for quarter sessions was to face its responsibility and to decide for itself on all the available information whether corrective training or imprisonment was the proper sentence. To give the option to the offender was to evade that responsibility and this court hoped that it would not happen again. This court thought that three years' corrective training would have been the proper sentence but, as any revision of the sentence would not be by way of reduction, the application would be refused. [H. P.]

WEIGHTS AND MEASURES

Weight deficiency—thefts by driver—employers' liability under Weights and Measures Act, 1889

Winter v. Hinckley and District Industrial Co-operative Society, Ltd.

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Ashworth JJ.: [1959] 1 W.L.R. 182.[12]

The respondents dispatched on their lorry some one-cwt. sacks of coal for the purpose of exposing them for sale. Each of the sacks was labelled "112 lb. coal," and when they were dispatched by the respondents contained this amount. The driver stole some of the coal from a number of the sacks, which were found to be deficient in weight when the lorry was later stopped by a district inspector of weights and measures. The respondent was charged in the magistrates' court with committing an offence under section 29 of the Weights and Measures Act, 1889. Section 29 provides for the weighing of sacks found in any vehicle carrying coal for sale, and continues:

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[12] For the appellant: *J. G. Jones* (instructed by Messrs. Kingsford, Dorman & Co. for John A. Chatterton, Leicester). For the respondents: *H. A. Skinner* (instructed by Messrs. Thomas Flavell & Sons, Hinckley).

"(2) If it appears to a court of summary jurisdiction that any . . . sack . . . so weighed is of less weight than that represented by the seller, the person . . . exposing the coal for sale . . . shall be liable to a fine not exceeding five pounds."

The justices were of opinion, *inter alia*, that since the act of stealing by the driver was outside the course and scope of his employment and done in fraud of the respondents, the act of exposing for sale was the act of the driver and not of the respondents; they accordingly dismissed the charge. The prosecutor appealed.

Held, allowing the appeal, that the coal still remaining in the sacks was part of the original coal which the respondents dispatched for the purpose of exposing it for sale; what was true of the whole was true of the part; and that therefore the respondents were clearly exposing it for sale.

Per curiam: Since the respondents were saddled with the misrepresentation by the dishonest act of their employee, it might well be that the justices would think it right to grant an absolute discharge. [D. C.]

Commentary. The decision does not seem to depend in any way on the fact that the pilfering was done by the respondents' servant and would, apparently, have been the same if it had been done by a stranger, without the knowledge of the respondents or their servant. It is enough that the accused has exposed the coal for sale and that it is in fact of less weight than represented by him. *Cf. Parker* v. *Alder* [1899] 1 Q.B. 20.

Under section 12 (5) of the Sale of Food (Weights and Measures) Act, 1926 (which is to be construed as one with the 1889 Act), if an employer proves that he used due diligence to enforce the execution of the Act and that the offence was committed by another person whom he brings before the court he shall be exempt from any penalty. The respondents brought their driver (C.) before the court but, as the justices found that there was no case for the respondents to answer, the informations against C. were also dismissed. Had C. been a party to the appeal, it is possible that the respondents would have been exempt from any penalty (but not from conviction: *Hammett* (*R. C.*) v. *Crabb* (1931) 145 L.T. 638). As C. was not before the court, section 12 (5) had no application.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Imprisonment

In R. *v.* MOODIE the court (Lord Parker C.J., Stable and Donovan JJ.: January 13, 1959) reduced a sentence of three years' imprisonment to one of twelve months' imprisonment. M., who was a man of forty-seven years of age, had no previous convictions; he had been found guilty at assizes of the manslaughter of his daughter aged twelve by administering to her a dose of nembutal and then asphyxiating her. M. was a prison officer of exemplary character and devoted to his family. The deceased child was a congenital imbecile; she suffered from epilepsy and was quite helpless. M. was found guilty of manslaughter on the uncontradicted evidence of the prison doctor, who formed the view that M. was suffering from such an abnormality of mind as substantially to impair his mental responsibility within the meaning of the Homicide Act, 1957. The court stated that this was a tragic case. The health of both parents had been affected by the child and the position had become more difficult as the child grew up. Ultimately the fraying rope had snapped and M. had killed the child. It was a most difficult case in which to impose a sentence upon the prisoner. There were public considerations and nothing the courts should do should lead the public to believe that a killing of this kind was other than a grave offence. But persons such as M. were not criminals in the ordinary sense and the deterrent (if any) in such cases was not a question of how many years' imprisonment was imposed. Here the circumstances were of such a mitigating character that this court felt able to reduce the sentence of three years' imprisonment to one of twelve months' imprisonment.

In R. *v.* CONNELL the court (Lord Parker C.J., Devlin and Donovan JJ.: March 10, 1959) reduced a sentence of five years' imprisonment to one of two years' imprisonment. C. had pleaded guilty at a Crown Court to shopbreaking (breaking into a club and stealing £70 worth of liquor). C., who was a man of thirty years of age, had five previous convictions; he was sent to borstal training in 1946, returned to borstal in 1948 and subsequently sentenced to twelve months', twenty-one months' and twelve months' imprisonment. C. had been last released from prison about three years before the present offence. The court stated that this was a severe sentence and it rather looked as if it had been imposed on the strength of C.'s previous convictions. This court thought that a sentence of two years' imprisonment would be appropriate, and that term would accordingly be substituted for the sentence of five years' imprisonment.

In R. *v.* REDMOND the court (Lord Parker C.J., Devlin and Donovan JJ.: March 10, 1959) reduced a sentence of five years' imprisonment to one of eighteen months' imprisonment. R. had pleaded guilty at quarter sessions to the larceny of £6 10s. in a wallet from the jacket of his host at a party. R., who was a man of thirty-two years of age, had many previous convictions and was, in fact, qualified for preventive detention. But the notice of previous convictions served upon R. was defective and quarter sessions had refused to act upon it. The court stated that, if R. had been sentenced to preventive detention, this court might well have been unable to interfere. Such a sentence would have been upon his previous record. But where preventive detention was not appropriate, or could not be imposed, the sentence must bear relation to the gravity of the crime. Where a man had a bad record, it was quite right for a court not to exercise such leniency as might be exercised in the case of a first (or almost the first) offence; but the sentence passed must be one which could be justified as appropriate to the gravity of the crime. The sentence of five years' imprisonment was, in the opinion of this court, too severe for stealing £6 10s., and accordingly a sentence of eighteen months' imprisonment would be substituted.

In R. *v.* ROBERTS the court (Lord Parker C.J., Devlin and Donovan JJ.: March 10, 1959) affirmed a sentence of three years' imprisonment. R., who was a boy of fifteen years of age, had pleaded guilty at a Crown Court to two offences of buggery. The court stated that the Crown Court had considered the case with great care and had obtained a probation report, but it had become quite clear that the only possible sentence was one which would enable R. to have a period of training under close supervision. This court, having considered the matter carefully, felt that three years' imprisonment was the right sentence.

Preventive detention

In R. *v.* GREENACRE the court (Lord Parker C.J., Devlin and Hinchcliffe JJ.: March 16, 1959) varied a sentence of eight years' preventive detention to one of two years' imprisonment. G. had pleaded guilty at quarter sessions to breaking into a shop and stealing jellies and cake to the value of £2 12s. 0d. G., who was a man of thirty-seven years of age with eight previous convictions, was at the time of the present offence serving a sentence of seven years' preventive detention, being out on licence. The court stated that the present offence was not a very serious one. G. was liable to be detained under the sentence of preventive detention in respect of which he had been on licence until 1961. To give this man another eight years' preventive detention for the present offence seemed to this court to be wrong, and the proper sentence should have been two years' imprisonment. No doubt he would be called upon by the prison commissioners to serve that sentence in preventive detention.

Corrective training

In R. *v.* ROGERS the court (Lord Parker C.J., Devlin and Donovan JJ.: March 10, 1959) varied a sentence of three years' corrective training to one of two years' imprisonment. R. had been convicted at quarter sessions of offences of taking away a van, warehouse-breaking and stealing electric cookers, and stealing a television set; and five other similar offences were taken into consideration. R., who was a man of thirty years of age, had eight previous convictions. The court stated that this was not a case for corrective training. In the first place, thirty years of age was about the upper limit for corrective training. Secondly, R. was, according to him, a grade I electrician and, according to the police, at least a trainee electrician at a colliery. There seemed, therefore, very little to be gained by sending him to corrective training. Thirdly, the recorder had seemed to be under the impression, when sentencing R., that an offender sentenced to corrective training might be released as soon as he had satisfied the authorities that he had benefited sufficiently from the training. Having regard to the offences, which were serious, and to R.'s record, this court could not exercise an exceptional measure of leniency. The appropriate sentence was one of two years' imprisonment and that sentence would accordingly be substituted for the sentence of three years' corrective training.

In R. *v.* ROGERS the court (Lord Parker C.J., Streatfeild and Hinchcliffe JJ.: March 23, 1959) varied a sentence of three years' corrective training to one of three years' imprisonment. R. had pleaded guilty at quarter sessions to two store-breakings, and five other offences were taken into consideration. R., who was a man of twenty-four years of age, had thirteen previous convictions and findings of guilt. The prison commissioners had reported that R. was not suitable for corrective training. The court stated that they had said on many occasions that where the prison commissioners had reported that a prisoner was not suitable for training, it was wrong to send him to corrective training where he would occupy room which could be better used by another man who required training. This was, however, certainly not a case in which R. should have a sentence of less than three years and, accordingly, a sentence of three years' imprisonment with an order under section 22 would be substituted for the sentence of three years' corrective training.

Borstal training

In R. *v*. REES the court (Lord Parker C.J., Streatfeild and Hinchcliffe JJ.: March 23, 1959) varied a sentence of borstal training to one of imprisonment for such period as would permit immediate release. R., who was a young man of twenty years of age, had pleaded guilty at quarter sessions to shopbreaking. The court stated that the offence for which R. had been sentenced at quarter sessions had been committed no less than three-and-a-half years ago and they felt that, in those circumstances, the sentence was wrong in principle. R. would already have served about three months and, accordingly, a sentence for such period as would permit immediate discharge would be substituted for borstal training.

Detention in detention centre

In R. *v*. COZENS AND SAWKINS the court (Lord Parker C.J., Streatfeild and Hinchcliffe JJ.: March 24, 1959) varied sentences of borstal training to sentences of detention for three months in a detention centre. C. and S. had pleaded guilty at quarter sessions to stack-firing. C. and S., who were young men of nineteen and eighteen years of age respectively, were both of good character. The court stated that the present offence seemed a senseless bit of mischief and deserved punishment. But both C. and S. had hitherto borne good characters and were good workers; and neither showed any criminal tendencies. Neither probation nor borstal training was, in the opinion of this court, the right remedy. The appropriate punishment was three months' detention in a detention centre in each case.

Acts and Orders[*]

Animals

The Live Poultry (Restrictions) Order, 1957 (S.I. 1957, No. 787), is amended, the principal alterations being (1) the alteration of the definition of "poultry dealer"; (2) the inclusion of a power to license the movement of poultry from particular premises to other premises for slaughter there by the Jewish or Moslem methods, and thus to exempt that movement from the restriction contained in the principal order on the movement of poultry from premises on to which there has been such a movement within the preceding 28 days; (3) the imposition of a duty to remove from the slaughterhouse the carcasses of poultry so slaughtered. LIVE POULTRY (RESTRICTIONS) AMENDMENT ORDER, 1959 (S.I. No. 466) (3d.), operative April 27, 1959.

For penalties for contraventions, see section 79 of the Diseases of Animals Act, 1950.

The Importation of Hay and Straw Order, 1955 (S.I. No. 370), under which it is prohibited to land in Great Britain hay and straw brought from any country other than a specified country, is amended by adding the Netherlands to the list of specified countries, and by clarifying the geographical description of Denmark, which already appears in that list. Operative February 28, 1959. IMPORTATION OF HAY AND STRAW (AMENDMENT) ORDER, 1959 (S.I. No. 287) (2d.).

For penalties for contraventions, see section 79 of the Diseases of Animals Act, 1950.

Assizes

The Summer Assizes for the County of Somerset are this year to be held at Taunton, and the Autumn Assizes are to be held at Wells this year and in 1960, and thereafter at Taunton and Wells alternately. ASSIZES (WESTERN CIRCUIT) ORDER, 1959 (S.I. No. 408) (3d.).

Birds

The area in the neighbourhood of Loch Garten, Inverness-shire, described in the schedule, is made a bird sanctuary. Entry into the area between April 1 and July 31 in any year is prohibited without written permission from the Royal Society for the Protection of Birds. WILD BIRDS (LOCH GARTEN BIRD SANCTUARY) ORDER, 1959 (S.I. No. 459) (3d.). Operative April 1, 1959.

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[*] Prepared by F. M. Drake, *Barrister-at-Law*.

For penalties for contraventions, see section 12 (2) (*a*) of the Protection of Birds Act, 1954.

Employment

Regulations made under the provisions of section 1 of the Agriculture (Safety, Health and Welfare Provisions) Act, 1956, prescribe requirements for the guarding, maintenance and operation of circular saws which are used by workers employed in agriculture. The requirements are divided into three groups. The first, which applies only to employers, relates principally to the guarding and maintenance of circular saws; the second, which applies only to workers, includes obligations to make use of the prescribed safety appliances, and to report prescribed defects in circular saws; the third, which applies to workers and employers, relates to general conditions of operation. Among general provisions in this latter group it is made unlawful for a worker who has never operated a circular saw to do so unless its working has been demonstrated to him by a person over 18 having a thorough knowledge of the matter; for a worker between 16 and 18 to operate a circular saw except under supervision of a person over 18 who has a thorough knowledge of its working; and, for a worker under the age of 16 to operate or assist at a circular saw in any circumstances at all. Certificates of exemption can be granted in suitable cases (Reg. 6).

Further Regulations made under the provisions of the same section lay down certain requirements in order to secure to agricultural workers safe places of work and safe means of access thereto, and for protecting such workers against risks of bodily injury arising out of their falling through holes in floors or walls, or from their workplaces, or while ascending or descending staircases or ladders. It is made unlawful for the employer (or, where the employer is a contractor, for the occupier of the farm) to cause or permit a worker to work at or use certain specified places on farms—mostly in buildings—except in accordance with scheduled requirements. These cover the construction and maintenance of floors and stairways, the provision of handrails in connection with stairways; and the guarding in the prescribed manner of apertures in floors and walls, and of edges of floors, wherever a worker is liable to fall more than 5 feet. Workers are prohibited from removing the prescribed guards except as permitted under the regulations, and they are required to report prescribed defects to their employers. All the above Regulations apply to Great Britain. AGRICULTURE (CIRCULAR SAWS) REGULATIONS, 1959 (S.I. No. 427) (4d.). Operative, as provided under Reg. 1, in part September 12, 1959, and as to the remainder March 12, 1960; save that the Minister may grant certificates of exemption as from March 12, 1959. AGRICULTURE (SAFEGUARDING OF WORKPLACES) REGULATIONS, 1959 (S.I. No. 428) (4d.). Operative April 1, 1961.

For penalties for contravention, see section 16 of the Agriculture (Safety, Health and Welfare Provisions) Act, 1956 (4 & 5 Eliz. 2, c. 49).

Food and Drugs

The Milk and Dairies Regulations, 1949 to 1954 (S.I. 1949, No. 1588; S.I. 1954, No. 1268), are revoked and re-enacted with amendments, the principal changes being (*a*) the registration of distributors is now required to be effected only with the local authority in whose area the premises from which the milk is distributed are situated (Reg. 8 (1)); (b) suitable and properly trapped internal drains are permitted in a milking house which is not used for the housing of cattle where no other means of drainage is reasonably practicable (Reg. 13 (*c*) (ii)); (c) provision is made for the local authority to pay compensation to a person who sustains damage or loss through being debarred from certain employment connected with cows or with milk because he is suffering, or has been in contact with a person suffering from a disease liable to cause infection of milk (Reg. 19 (4)); (d) where milk is infected, or suspected of being infected, with disease—(i) the appropriate notice may be served by a medical officer of health on the occupier of registered premises outside (as well as inside) his district (Reg. 20 (1)) and, in the case of tuberculosis, it shall operate until it is withdrawn (Reg. 20 (3)); (ii) the conditions as to compensation have been considerably modified (Reg. 20 (6)); (e) an electric or gas boiler may be used in a milking house or milk room, and bottles which have contained certain foods other than milk may be cleansed in a milk room (Reg. 21 (1) and (5)); (f) there are new provisions as to personal cleanliness, precautions against contamination or infection of milk, and the provision of first-aid equipment (Reg. 22); (g) the Minister may permit milk to be cooled in a closed container in a milking house not used for the housing of cattle where the cows are milked by mechanical means direct to such container (proviso to Reg. 23); (h) there are new provisions relating to the misuse of milk churns (Reg. 25), the cleansing of vessels and appliances, the storage of cartons and non-returnable containers (Reg. 27 (3)) and the use of a bottle-washing machine for cleansing glass bottles (Reg. 27 (6)); (i) the collection of milk by milk tanker from a tank on a farm is permitted (proviso to Reg. 30 (i)); (j) a person selling milk as, or as part of, a meal or refreshments is exempted from the prohibition against opening any receptacle containing milk or transferring milk from one receptacle to another elsewhere than on registered premises (Reg. 30 (2) (*b*) and proviso (*b*) (ii) to Reg. 30 (1)). Operative March 8, 1959. MILK AND DAIRIES (GENERAL) REGULATIONS, 1959 (S.I. No. 277) (9d.).

For penalties for contraventions, see Regulation 34 of these Regulations.

The Labelling of Food Order, 1953 (S.I. No. 536), as amended, is further amended by inserting therein new provisions relating to ice-cream. The new provisions (a) prohibit the labelling, marking or advertising of ice-cream in a manner suggestive of butter, cream, milk or anything connected with the dairy interest unless the ice-cream contains no fat other than milk fat (apart from fat introduced by the use as an ingredient of any egg, flavouring substance, emulsifying or stabilising agent) but permit the presence of skimmed milk solids to be declared; (b) impose requirements as to the labelling of pre-packed ice-cream containing fat other than milk fat (apart from fat introduced through an ingredient as above). Minor drafting changes are made in Tables A and C of the First Schedule to the principal Order. The Regulations apply in England and Wales only, and have effect as if made under section 7 of the Food and Drugs Act, 1955. Operative April 27, 1959. LABELLING OF FOOD (AMENDMENT) REGULATIONS, 1959 (S.I. No. 471) (3d.).

For penalties for contraventions, see section 106 of the Food and Drugs Act, 1955.

The Food Standards (Ice-Cream) Order, 1953 (S.I. 1953, No. 828), is replaced in its application to England and Wales. Amended standards of composition for ice-cream and "Paren" (kosher) ice are prescribed and separate standards of composition are introduced for dairy ice-cream and milk ice. Alternative standards are prescribed for certain descriptions of ice-cream containing fruit, fruit pulp or fruit juice. Operative April 27, 1959. FOOD STANDARDS (ICE-CREAM) REGULATIONS, 1959 (S.I. No. 472) (3d.).

For penalties for contraventions see Regulation 6 of these Regulations.

The MEAT (STAINING AND STERILIZATION) (REVOCATION)

REGULATIONS, 1959 (S.I. No. 473) (2d.), operative March 26, 1959, revoke the Regulations (S.I. 1959, No. 20) which were to have come into force on April 1, 1959.

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 282 (Hackney) (2d.); 283 (Westminster) (3d.); 332 (Ilford) (2d.); 515 (Chertsey) (3d.); 516 (St. Marylebone) (2d.).

The following Order has been made prohibiting waiting: S.I. No. 261 (Walton and Weybridge) (3d.).

A speed limit of 40 m.p.h. is imposed on the driving of mechanically propelled vehicles on lengths of road in the London Traffic Area specified in the Schedule to the Regulations. Earlier Regulations imposing a similar speed limit are in whole or in part revoked as roads to which these Regulations applied are now comprised in the lengths of road numbered 6 and 8 in the Schedule to these Regulations. Operative February 14, 1959. LONDON TRAFFIC (40 m.p.h. SPEED LIMIT (NO. 1) REGULATIONS, 1959 (S.I. No. 228) (3d.).

For penalties for contraventions, see section 10 of the Road Traffic Act, 1930, as amended by section 2 (2) of the Road Traffic Act, 1934.

Parking places on certain highways in the Borough of St. Marylebone are designated as places at which charges may be made by the Council of that Borough for vehicles authorised by the Order to be left in those parking places, the location of which is described in the Schedule and shown on the plan referred to in the Order (Article 3). These parking places are to be in operation between 8.30 a.m. and 6.30 p.m. on any day other than a Saturday, Sunday, Christmas Day, Good Friday or Bank Holiday (Article 2 (1)). The vehicles which may be left in the parking places are set out in the Schedule, and the vehicles are defined by Article 2 (1). The periods for which the vehicles may be left in these places and the amount of the charges are specified (Articles 8, 9 and 10). Provision is made for the installation of parking meters (Article 13) and for payment of the initial charges by the insertion of coin in the meters (Article 8). Excess charges are to be paid direct to the Council (Article 12). Provision is further made for the attachment of notices to vehicles by parking attendants to indicate that the excess charge has been incurred (Article 9 (2)) and in certain other circumstances (Articles 8 (2) and 10 (2)), for the manner in which vehicles are to stand in the parking places (Article 16), for the removal of vehicles from the parking places in certain circumstances (Article 18), the suspension of the use of the parking places (Articles 21 and 22), for vehicles to wait free of charge in the parking places for specified purposes, *e.g.*, to enable persons to board or alight from such vehicles (Article 24) and for other matters arising out of the application of the Order. Operative for preliminary purposes to enable the Council to acquire the parking meters and carry out works on March 17, 1959, and as to the remainder June 24, 1959. PARKING PLACES (ST. MARYLEBONE) (NO. 1) ORDER, 1959 (S.I. No. 429) (11d.).

For penalties for contraventions see section 22 of the Road Traffic Act, 1956.

Magistrates' Courts

The following Order has been made in respect of petty sessional divisions; S.I. No. 422 (Lincoln, Parts of Lindsey) (3d.).

Matrimonial Causes

Various Orders in Council which, from time to time, have extended the provisions of the Maintenance Orders (Facilities for Enforcement) Act, 1920, to various parts of Her Majesty's dominions, are now consolidated in this Order. The Act is also extended to the whole of Ghana, including Togoland, and to the Falkland Island Dependencies. Operative March 11, 1959. MAINTENANCE ORDERS (FACILITIES FOR ENFORCEMENT) ORDER, 1959 (S.I. No. 377) (4d.)

Merchandise Marks

Various imported garments made from woven cloth, which are specified in Article 1 of the Order, are required to show an indication of origin which is to be applied in the manner specified in Article 2. The garments are to bear the indication of origin on sale or exposure for sale, and this requirement extends to exposure for sale wholesale, whether or not the person exposing the garment is a wholesale dealer. Operative June 11, 1959. MERCHANDISE MARKS (IMPORTED GOODS) NO. 1 ORDER, 1959 (S.I. No. 404) (3d.).

For penalties for contraventions see section 5 of the Merchandise Marks Act, 1926.

Pests

The restrictions imposed by the principal Orders (S.I. Nos. 81 and 405) in respect of the importation of certain raw vegetables from specified districts of Belgium, France, Italy and the Netherlands, are modified for specified periods of the year 1959. IMPORTATION OF RAW VEGETABLES ORDER, 1959 (S.I. No. 219)

(3d.); (SCOTLAND) ORDER, 1959 (S.I. No. 304) (3d.). Both operative March 1, 1959.

The restrictions on the importation of potatoes, which were formerly contained in the Importation of Plants Order, 1955 (S.I. 1955 No. 81), now revoked, see below, are re-enacted with modifications. The importation of main crop potatoes is allowed from the countries set out in the Second Schedule and of new potatoes from the countries and during the periods set out in the Third Schedule. In all cases a health certificate must accompany the potatoes, satisfying the requirements of the Order about freedom from pests and diseases. The importation of seed potatoes is wholly prohibited. Provision is made for the disposal of potatoes imported in contravention of the Order and of those found to be unhealthy at the time of importation. Authorised officers of the Ministry of Agriculture, Fisheries and Food are empowered to examine and take samples of imported potatoes and licences may be given modifying the requirements of the Order. Operative February 25, 1959. IMPORTATION OF POTATOES ORDER, 1959 (S.I. No. 221) (6d.).

For penalties for contraventions, see Article 16 of the Order.

The provisions concerning potatoes which were formerly in a previous Order (S.I. 1955 No. 81) are revoked by the IMPORTATION OF PLANTS (AMENDMENT) ORDER, 1959. Operative February 15, 1959 (S.I. No. 220) (2d.).

Probation

The Probation Rules, 1949, are amended by providing for increased scales of salary for whole time probation officers and senior probation officers. Operative March 12, 1959. PROBATION RULES, 1959 (S.I. No. 444) (3d.).

Public Service Vehicles

The principal Regulations (S.I. 1958, No. 473) are amended. Regulation 7, which lays down certain minimum turning circle requirements, is modified so that vehicles first registered after January 1, 1932, and before April 1, 1959, need now only comply with the requirements specified in paragraph (2); if they cannot comply with the requirements specified in paragraph (1) of that Regulation, (Reg. 2 (*a*)). (2) Regulation 17 which deals with the placing of fuel tanks under any access way to an emergency exit is no longer applicable to a passage way leading to such an exit provided in accordance with Regulation 26 (1) (*b*) (Reg. 2 (*b*)). (3) Regulations 32 and 33 which specify requirements as to the width and height of gangways, are now excluded from applying to any space between two facing seats placed lengthwise which is not required for the purpose of obtaining normal access to any other seats or to an exit from those other seats (Reg. 2 (*c*)). (4) Paragraph (2) of Regulation 35 is modified so that vehicles registered before April 1, 1959, need now only comply with the conditions as to minimum measurements between and in front of seats specified in that paragraph, if they cannot comply with the requirements of condition (*b*) of paragraph (1) of that Regulation relating to such measurements (Reg. 2 (*d*)). Operative March 16, 1959. PUBLIC SERVICE VEHICLES (CONDITIONS OF FITNESS) (AMENDMENT) REGULATIONS, 1959 (S.I. No. 382) (3d.).

For further penalties for contraventions see section 113 of the Road Traffic Act, 1930.

Revenue

The principal Order (S.I. 1958, No. 299) is amended by permitting travellers to take out of the United Kingdom and the Channel Islands £20 instead of £10 in sterling notes. Operative March 26, 1959. EXCHANGE CONTROL (IMPORT AND EXPORT) (AMENDMENT) ORDER, 1959 (S.I. No. 517) (2d.).

Seeds

The Minister of Agriculture, Fisheries and Food and the Secretary of State for Scotland have, by these Licences, extended for two periods in the year 1959 the time during which particulars of germination of certain grass and clover seeds may be given to a purchaser by a seller of those seeds. The requirement of the Seeds Act, 1920 (10 & 11 Geo. 5, c. 54) as amended by the Agriculture (Miscellaneous Provisions) Act, 1954 (2 & 3 Eliz. 2, c. 39) that such particulars must be given not later than seven days after the sale or delivery of the seeds, whichever is the later, is varied by extending the period of seven days to thirty-five days after sale in the case of grass seeds and mixtures of grass seeds and clover seeds, and to twenty-one days after sale in the case of clover seeds. These extensions only take effect during the period from March 20 to May 15, 1959, inclusive, and from August 1 to October 15, 1959, inclusive. The time for delivery of particulars other than those of germination remains unaffected by this Licence. Operative March 20, 1959. GRASS AND CLOVER SEEDS GENERAL LICENCE, 1959 (S.I. No. 460) (3d.); (SCOTLAND) (S.I. No. 463) (3d.).

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of readers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

56. *Section* 51 *of the Malicious Damage Act,* 1861

In this area there have recently been a number of cases where street fighting has taken place, mostly during the hours between 10 p.m.–2 a.m., and as a result of these street fights, one of the principals concerned has been either pushed or knocked into a show window, causing damage to the amount of £25 and upwards. The offenders concerned have been dealt with for offences of causing a breach of the peace or street fighting contrary to the local by-laws, and when dealing with this kind of occurrence as the investigating officer, I have always preferred charges of malicious damage under section 51 of the Malicious Damage Act, 1861.

On one occasion the charge was brought against the person who pushed the other person into the window, and on a second occasion against both of the principals concerned and when the cases came before the local magistrates' court, the charges were both dismissed with the comment that there was no malicious intent to break the window.

I am of the opinion that a charge of malicious damage is justified on the following points;

(a) The act of fighting in the street is unlawful.

(b) The Act states that the word "maliciously" can be construed to mean "recklessly" as in *R.* v. *Pembliton* and *R.* v. *Latimer,* where the actions of the defendants were sufficiently reckless because in one case they fought on the pavement and in the other case in an arcade, in both cases only a few feet from large shop windows the presence of which they must certainly have known.

Do you consider that a charge under section 51 of the Malicious Damage Act, 1861, is correct under these circumstances or not?

[F. D.]

ANSWER

If it is found as a matter of fact that the proximity of the windows to the fighters was such that they must have had in their minds the possibility that the windows would be broken, there seems no answer to a charge of malicious damage. In the three leading cases on the meaning of "unlawfully and maliciously"—*Pembliton* (1874) L.R. 2 C.C.R. 119; *Faulkner* (1877) 13 Cox 550; *Cunningham* [1957] 2 Q.B. 396—the appeal was allowed on the ground that the summing up erroneously directed that if a man was acting unlawfully malice could be assumed. However, in each case the court was careful to point out that had the evidence shown recklessness, and had the jury been asked to consider whether, although there was no intention to do the harm forbidden by the statute, there was knowledge that such damage would probably result, the conviction would have stood. There seems to be a prima facie case of such recklessness in the facts stated by our correspondent. [D. W. E.]

Letters to the Editor

Taking Other Offences Into Consideration

Sir,

Further to my articles on the taking into account of outstanding charges when sentencing a criminal,[1] I have now been asked by two of your readers to comment on those aspects of the subject which involve the jurisdiction of courts-martial and the Northern Ireland courts respectively.

Wing Commander E. E. W. Lloyd-Jones, writing from H.Q., 2nd T.A.F. in Germany, refers to the relevant Rules of Procedure made under the Air Force Act, 1955.[2] Section 105 (1) of that Act provides that:

> "Rules of Procedure may be made for determining the cases in which and the extent to which courts-martial may, in sentencing an accused for any offence of which he is convicted, at the request of the accused take into consideration other offences [3] against this Act committed by him."

This subsection gives limited statutory recognition to the long established practice of taking other offences into account. The resulting Rules of Procedure, however, represent little more than a statement of the present practice in civil courts, although there is a definite ruling that only offences "of a similar nature" are within the scope of the procedure.[4]

As a result of the special relationship between the serviceman and the State, courts-martial have, in effect, the means of imposing a separate penalty for a "considered" offence upon a person subject to military or air force law. Section 105 (2) of the Army Act, 1955,[5] confers on courts-martial the power "to direct the making of such deductions from the offender's pay as the court would have had power to direct if he had been found guilty of the offence or offences taken into consideration as well as the offences of which he was in fact found guilty." In appropriate cases, therefore, the court-martial may award the punishment of "stoppages,"[6] both for the offences taken into account and for the offences for which the accused has been actually convicted.

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[1] [1959] Crim.L.R. 18, 108, 197.

[2] Rules of Procedure (Air Force), 1956, S.I. 1956, No. 163, rr. 72, 74 (3).

[3] Includes civil offences committed while the accused was subject to air force law, as these are offences under the Air Force Act, 1955, s. 70.

[4] See r. 72 (1).

Further, it would seem that the apparent conflict in civil law between the cases of *McMinn*[7] and *Nicholson*[8] has been resolved under the Army and Air Force Acts. A person subject to military or air force law may not be tried for offences taken into account in a sentence awarded by a competent civilian court or a court-martial.[9] If, however, confirmation of the sentence of the court-martial is withheld or that sentence is quashed, there appears to be no objection to a further trial for the "considered" offences.[10]

Mr. William J. T. Roy of Omagh mentions that the practice under discussion now enjoys statutory authority in Northern Ireland. Section 4 (1) of the Criminal Justice Act (Northern Ireland), 1953, provides that:

> "Where a person, on being convicted of an offence, admits himself guilty of any other offence and asks the court to take it into consideration in imposing punishment, the court may, unless objection is made by or on behalf of the prosecutor or unless it is an offence in respect of which the court has not jurisdiction to award punishment, take it into consideration accordingly."

Previously the practice in Northern Ireland had been confined to the taking of similar offences into account, the normal English court procedure.[11] Section 4, however, imposes no such limitation and Northern Ireland courts are empowered to dispose of any outstanding charge, whether or not that charge is similar to the one of which the accused has been found guilty.

On the other hand, it would appear from the wording of the section that an objection by the prosecution is fatal to the use of the procedure. Under English law the view of the prosecuting authorities is merely one factor—though it is an important one—to be considered by the court when exercising its discretion. The decision whether or not to employ the practice rests ultimately with the court alone.[12]

In general, it cannot be said that the Criminal Justice Act (Northern Ireland), 1953, has overcome those difficulties which arise from the ruling that no "conviction" is recorded where an offence is taken into consideration.

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[5] Air Force Act, 1955, contains an identical provision.

[6] The recovery, by deductions of pay of the offender, of a specified sum by way of compensation for any expense, loss or damage occasioned by the offence: Army Act, 1955, s. 225 (1).

[7] (1945) 109 J.P. 130; *cf. Browne* (1943) 29 Cr.App.R. 126.

[8] [1947] 2 All E.R. 535, and see [1959] Crim.L.R. 202.

[9] Army Act, 1955, s. 134 (1) (*a*).

[10] See Army Act, 1955, s. 134 (2) (*b*).

[11] *Smith* (1921) 85 J.P. 224; *cf. MacMillan* (1921) 16 Cr.App.R. 113.

[12] *McLean* [1911] 1 K.B. 332.

Thus the Irish courts are unable to make an order either for restitution of stolen property involved in thefts dealt with in this way, or for compensation for loss of property suffered as the result of a felony similarly treated.[13] Again, where outstanding offences have been taken into account, there is no power to pass a sentence greater than the maximum which may be awarded for the crime for which the accused has been found guilty.[14] Moreover, it is not advisable to take into consideration motoring offences which render a person liable to be disqualified for holding or obtaining a driving licence, unless a conviction for the offence actually tried itself carries that penalty.[15]

This Act of Northern Ireland does, however, settle the point of conflict in English law between *McMinn* and *Nicholson*. Section 4 (2) provides that where an offence is taken into account, the accused cannot be prosecuted for that offence unless the basic conviction is reversed or quashed[16] or otherwise annulled.

It is suggested that the lead thus given by the Northern Ireland legislature towards a settlement of the practice of taking other offences into consideration should be followed in England by a simple statutory provision making outstanding charges which are so disposed of rank as convictions for all purposes.

Yours faithfully,

R. D. MARGRAVE-JONES.

Llandrindod Wells.

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[13] Larceny Act, 1916, s. 45: Forfeiture Act, 1870, s. 4.

[14] *Tremayne* (1932) 23 Cr.App.R. 191; *Hobson* (1942) 29 Cr.App.R. 30.

[15] See Road Traffic Act (N.I.), 1955, s. 57 (1).

[16] This covers cases set aside in certiorari; see Criminal Appeal (N.I.) Act, 1930, s. 3 (2).

Books and Periodicals

See p. 350, *ante*.

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THE CRIMINAL LAW REVIEW

June 1959

Legal penalties: the need for revaluation

At page 393 we publish a report on legal penalties prepared by a committee of *Justice*, the British Section of the International Commission of Jurists. The members of the committee were: Sir David Scott Cairns, Q.C., chairman, H. Graham Barrow, Patrick Fitzgerald, G. E. Garrett, Dr. Albert Kiralfy, Brian Simpson and J. E. Hall Williams; the secretary to the committee was Mr. Tom Sargant.

The report draws attention to a number of anomalies revealed by a survey of maximum penalties; it also poses a number of questions which, the committee consider, are relevant to the fixing of a maximum penalty for a particular type of crime.

What appears most clearly from the report—and perhaps even more clearly from the tables which follow it—is that the majority of present maximum sentences are the result of historical accident and not of any conscious, thought-out policy related to the gravity of the various offences or the possibility of aggravating or mitigating circumstances. The report makes out a clear case for a reconsideration of this aspect of the law.

Both this report and the report of an earlier committee, on contempt of court,[1] show that much useful work can be done by these voluntary committees appointed by *Justice* to spotlight anomalies in the law. It is to be hoped that this work will not be wasted.

The prevention of forgery

This *Review* deals with many aspects of crime—its content, detection and punishment—but rarely with its prevention. At

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[1] See p. 310, *ante*.

p. 421, *post*, however, we publish an article by Dr. Wilson Harrison on the preparation of important documents so as to avoid the attention of the forger.

Viscount Templewood

The death of Viscount Templewood will be mourned by all whose work or interest lies in the field of penal reform. His contribution to this work, both during his period of office as Home Secretary and, later, as President of the Howard League for Penal Reform, was very great and was sustained right to the end of his life.

Intolerable behaviour by the press

Approving, on May 11, alterations in the arrangements made by a probation officer for a man who had had a probation order substituted for a sentence of eight years' preventive detention on appeal to the Court of Criminal Appeal, Lord Parker C.J. described as " intolerable " the behaviour of certain representatives of the press which had made the alterations in arrangements necessary.

Lord Parker C.J., who sat with Donovan and Salmon JJ., said that when the case came before the court on March 23 the probation order was substituted for the preventive detention sentence largely as a result of the generous attitude of the managing director of the company who had previously employed the prisoner.

The managing director was confident that given a chance he could enable the prisoner to start a new life. The company controlled two factories, and the court accordingly arranged with the probation officer and the managing director that the prisoner was to go to one of them.

It now appears that the same afternoon a representative of the press got in touch with the company secretary and obtained the name of the factory.

One or more representatives of the press then went there, and, as a result of their activities, workers of the factory learned of the prisoner's record. One employee was even asked " Do you feel quite happy in the knowledge that you will be working with a man who has six previous convictions? " or words to that effect.

In the result it became quite impossible to send the man to that factory and the managing director, with the probation officer's permission, then took the man to the other factory.

"The probation officer has now applied to this court for further directions. The probation officer clearly acted in the man's best interests, and the court gives its approval to the course taken.

"The court feels, however, that it cannot let this action on the part of certain representatives of the press pass unnoticed and uncondemned. Such action is really intolerable.

"It is hard enough even in the best circumstances for a man with previous conviction to live down his past and make a new start. It becomes almost impossible when before ever he has met his fellow workmates they are informed of his record.

"The court hopes that the press who can in general be relied upon to act responsibly and fairly will not, in reporting this case, publish names of the persons and factories in question and thus make it still more difficult for all concerned."

Postponing sentence

In the report of *R.* v. *West* in "Principles of Punishment" at page 300, *ante*, it was not pointed out that sentence had been postponed in order to give the prisoner an opportunity of fulfilling a promise to make restitution. The Court of Criminal Appeal were emphatic in saying that this was the wrong method of dealing with such a case.

Street prostitution

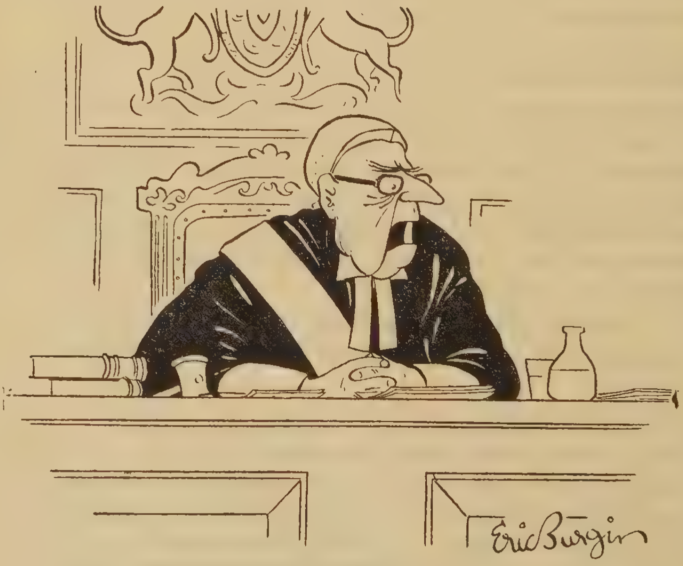
A Birmingham city "drive" against street prostitution ended in three women being sent to prison for fourteen days for offences under section 28 of the Town Police Clauses Act, 1847. Five others were fined £2 each, one was fined £1 and another was conditionally discharged. The section imposes a maximum penalty of £2 or, at the discretion of the convicting magistrate, up to fourteen days' imprisonment on:

> "Every common prostitute or nightwalker loitering and importuning passengers for the purpose of prostitution."

Disturbing the clergy

Two women who chained themselves to a statue of St. Peter in Westminster Cathedral, at a time when a baptism was being conducted, were arrested and charged under section 2 of the Ecclesiastical Jurisdiction Act, 1860, with disturbing a clergyman in the exercise of his duty. They were each fined £5 and given seven days to pay. One of the women, Mrs. Beatrice Snowden, was committed to prison for seven days for failure to pay a fine of £1 imposed at an earlier date for insulting behaviour outside Westminster Cathedral.

The Ecclesiastical Jurisdiction Act, 1860, provides a maximum penalty of £5 or two months' imprisonment for the offence with which the women were charged. Arrest may be made by a constable or churchwarden.



". . . and I think I can say this, without fear of contradiction . . ."

Legal Penalties: The Need for Revaluation

The Report of a Committee appointed by JUSTICE

SCOPE OF THE INQUIRY

In this report we treat the word "penalty" as meaning any type of punishment authorised by law to be inflicted by a criminal court and we assume that the purpose of our inquiry is to form an opinion as to whether some general review is needed of penalties laid down by statute or available under the common law. What the law provides is, of course, almost always, a *maximum* penalty.

It must always be remembered that English law allows a much wider discretion as to the penalty to be imposed than is common under other systems of law. In practice, especially in the case of offences dealt with on indictment, the punishment awarded by an English court is usually far below the maximum, and full use is made by the courts of the powers to make orders for probation or for conditional or absolute discharge, even in cases where the statutory maximum is a very long term of imprisonment. The breadth of the discretion granted to the courts makes it possible for considerable discrepancies to exist between the ways in which different courts deal with similar offences. On the other hand, it is only by allowing a wide discretion that the court can be enabled to take account of the innumerable factors, affecting the nature and circumstances of the crime and the history and personality of the defendant, which ought to be taken into account in assessing punishment.

We are conscious that when any criticism is made of penalties actually inflicted such criticism is much more often directed against the way in which a court has exercised its discretion in fixing the penalty than against the legal limitations to that discretion. After considerable discussion we decided that any useful investigation of possible injustices involved in sentences which have been passed, or of the apparent discrepancies in sentencing practice between one court and another, would necessitate the collection of a vast amount of material which would be quite beyond the scope of this committee. We understand that two pieces of research are being carried out in the universities on the sentencing policy of the courts, which will cover certain aspects of these matters.

Further, we have not attempted to deal with any question whether new types of penalty should be introduced or whether any of the present methods of punishment should be superseded. We do not regard "revaluation" of penalties as including the examination of such matters as the desirability or otherwise of corporal punishment or the finding of suitable substitutes for ordinary imprisonment. We assume that, broadly speaking, punishment will continue to be by death, deprivation of liberty or fine, and that what are to be revalued are the terms of imprisonment and the fines that are provided for different crimes.

We have not found it easy to isolate the problem of revaluation of penalties from the general question of reform of the criminal law. The first thing that must strike anybody who looks at a list of maximum penalties such as that contained in Archbold's *Criminal Pleading and Practice* is the immense variety of maxima provided for crimes which are not inherently very different from each other.

There may well have been valid historical reasons for such apparent anomalies, though in many cases such reasons are now undiscoverable and in many more they have ceased to have any practical significance. The obvious solution in most cases would be to reduce the number of separate categories of crime rather than merely to bring the maxima into line. Thus, for instance, the normal maximum penalty for malicious damage is two years' imprisonment; but for malicious damage to buoys it is seven years; and for malicious damage to hopbinds it is fourteen. On the face of it, damaging buoys would seem to be a more serious offence than damaging hopbinds, but damaging an aircraft or a piece of delicate machinery would be likely to be more serious still. The truth is, however, that the mere question of what type of article is damaged is only one, and not the most important, of the elements that go to make a particular act of malicious damage grave or trivial. There seems to be no point in having these different maximum penalties, but for that matter there seems to be no point in having this series of different crimes, and the logical course would be to bring all types of malicious damage under one head—or else to provide different categories on some basis more in accordance with contemporary ideas. But at this stage we come to a general problem of reform of the substantive criminal law.

Confining ourselves, then, to the matter of prescribed penalties, these questions seem to arise:

(1) Are some of the maxima too low?

(2) Are some of them too high, and if so does it matter?

(3) Should an effort be made to remove the many existing anomalies?

(4) Should some general rules be laid down as to matters that may be taken into account by way of aggravation or mitigation?

(5) Is there a case for having fixed or minimum penalties for some crimes?

We consider these questions in turn.[1]

DISCUSSION OF THE QUESTIONS INVOLVED

(1) *Are some of the maxima too low?* A penalty is too low if it forms no real deterrent to the commission of the offence. It is in our view wrong in principle that a penalty should be so limited that a large proportion of the people who are inclined to commit the offence in question will consider it worth while to do so continually and to pay the penalty exacted by the law, regarding it merely as a tiresome expense incidental to their activities. Prostitution and street betting are two obvious examples. If any form of behaviour is constituted a crime it seems clear that the maximum penalty should be sufficient to act as a real deterrent.

(We recognise that there are some offences, *e.g.*, some of those connected with Sunday observance, which are themselves archaisms. While those remain on the Statute-book, we should not suggest increasing the penalties. In such cases it is the substantive law and not the penalty provision which needs revision.)

If the maximum penalty is frequently imposed for some offence the reasonable inference is that the maximum is too low. The maximum should be high enough to be adequate punishment for the worst cases in the category covered. A conspicuous example, until recently, of a penalty that was too low was the maximum fine of £2 for fraudulent travelling on the railways. That maximum must have been imposed in many thousands of cases before it was raised in 1950 to £5. We express no opinion as to whether the new limit is high enough.

We have, indeed, no means of carrying out the elaborate investigation that would be needed to form any definite opinion as to whether any particular maximum penalty is too low; but we are satisfied that there must be many that could be raised with advantage. Possible candidates would include indecent assault on females (2 years); simple drunkenness (10s. to 40s.); and being drunk and disorderly (40s. or one month). We consider that this is a matter that should be looked into by some properly equipped body, with a view to preparing legislation raising the maxima in all cases where there is a serious doubt as to the adequacy of the existing penalty.

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[1] See also classified tables at pp. 403 *et seq., post.*

(2) *Are some of them too high, and if so does it matter?* There must be many crimes for which the maximum punishment has not in fact been imposed for generations. It is inconceivable today that a life sentence should be imposed for " personating an owner of stock " or for destruction of a baptismal register; that fourteen years' imprisonment should be awarded for poaching by three armed persons, or five years for cheating at games. These are oddities and archaisms which are not of great practical importance but two points of much wider significance may be mentioned. The first is that there is normally no definable limit to the amount of a fine that may be imposed on conviction on indictment (see *R.* v. *Morris*,[1a] where it was held that the only limit was that provided by Magna Carta and the Bill of Rights, *i.e.*, that the fine must not be " excessive "). The second is that there is no limit to the imprisonment that may be imposed on conviction on indictment for any common law offence, including, in general, any *attempt* to commit a felony or misdemeanour.[2] While the Court of Criminal Appeal has laid down that an attempt should not be punished with a heavier penalty than the maximum prescribed for the full offence,[3] it remains true that, in theory at least, the maximum imprisonment for, say, forgery of documents not otherwise provided for is two years but there is no fixed maximum for an attempt to commit such a forgery. Similar considerations apply to a conspiracy to commit an offence.[4]

Does it matter? Everybody knows that the maximum sentence is hardly ever imposed for any crime except murder and some minor crimes where the penalty happens to be a very low one. Courts of assize and quarter sessions are dealing constantly with housebreakers who are liable to fourteen years' imprisonment but in practice, apart from the defendants put on probation, discharged, fined, or sent to Borstal, corrective training or preventive detention, the sentence will range from, say, nine months to five years according to the previous record and the number and gravity of the offences being dealt with. Does it then make any practical difference to anybody whether the maximum is seven, fourteen or twenty years?

In our opinion the amount of the maximum is of importance for the following reasons:

[1a] [1951] 1 K.B. 394.

[2] Archbold, 34th ed., § 4111.

[3] *R.* v. *Pearce* (1942) 36 Cr.App.R. 146.

[4] See *R.* v. *Morris, supra.*

(a) The provisions of the law have an effect upon both judicial and lay attitudes to crimes, and if the maximum penalty is fixed high the crime tends to be regarded as more serious than if the maximum were low. This point is made with great force in the case of capital punishment by the Royal Commission on Capital Punishment.[5] It is, we think, inevitable, and indeed right, that a judge or bench of magistrates in considering sentence should pay some regard to the statutory maximum (apart from the obligation not to exceed it). If the legislature considers that two years is a suitable maximum for indecent assault on a female and ten years is the proper maximum for indecent assault on a male, then a judge must and should regard the latter as an offence which demands heavier punishment than the former, circumstances being as nearly as possible equal. Moreover the public, in so far as they are aware of the difference, are likely to be affected by it in the degree of repugnance that they feel for the crime. So far as the potential criminal is concerned, if he knows of the maximum at all and pays any heed to it, a maximum which bears some relation to the punishment he is likely to receive may be more effective than one which is so high that he does not regard it as a serious risk.

(b) The purpose of fixing maxima is to put some limit on judicial discretion and if there is to be such a limit for some crimes there should be a limit for all and it should be chosen rationally. The whole notion of legality, to which JUSTICE is dedicated, involves a distrust of excessively wide discretionary powers and seeks to impose such limitations as are consistent with the public interest.

(3) *Should an effort be made to remove the many existing anomalies?* The removal of anomalies may be said to consist in the raising of maxima which are too low and the lowering of those which are too high, and therefore to be covered by the discussion in the last two sections. The points we wish to emphasise in this section are: (i) that while for any crime considered in isolation all that matters is that the maximum penalty should be sufficient to deal with any case likely to arise and not so great that it cannot conceivably be necessary to impose it, it is desirable that in a rational legal system the *relationship* between the maxima for different crimes should be a logical one; and (ii) that the law should aim at being as simple, intelligible and consistent as possible.

As an example we take Larceny. Larceny of dogs after a previous conviction is punishable by eighteen months' imprisonment; for larceny of deer (after a previous conviction), of fish, of hares or rabbits by night, of ore, or any larceny of up to £5 in value by a tenant or lodger, the maximum is two years' imprisonment: for simple larceny and also for larceny of documents of title, electricity, fixtures, plants or trees it is five years; for larceny of postal packets by an officer of the post office, or for larceny over the value of £5 by a tenant or lodger it is seven years; for larceny by a clerk or servant, larceny from the person or from ships, docks, etc., larceny in a dwelling-house, larceny of cattle or of certain goods in process of manufacture, it is fourteen years; and for larceny of postal packets from mail bags or of wills or for larceny by an officer of the post office of a packet containing a valuable security, it is life imprisonment. (This list is far from including all the varieties of larceny known to the law.)

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[5] 1953, Cmd. 8932, para. 59.

The maximum penalty for obtaining goods, money or a valuable security by false pretences is five years' imprisonment.

Clearly the theft of a valuable greyhound may be a graver offence than the theft of half a crown in a dwelling-house. He who obtains an enormous sum by a cleverly devised scheme of false pretences may deserve heavier punishment than he who, on the spur of the moment, steals a letter containing a postal order.

We draw attention to the extraordinary jumble of criteria which govern the maximum: sometimes it depends on value; sometimes on the type of goods stolen; sometimes on the status or occupation of the thief; sometimes on the place of theft; sometimes on whether it is a first or subsequent offence. For rabbits and hares, but for nothing else, the maximum depends on whether it is a day or a night offence; the gravity of a lodger's theft depends on the value but for a clerk or servant it does not; and so forth.

In our opinion the criminal law would be greatly improved by a simplification of the provisions as to the punishment for larcenies and by the making of some more realistic assessment of the comparative gravity of larceny and false pretences. For larceny the defect is one of over-elaboration, for false pretences it is rather one of excessive uniformity.

We recognise that different types of larceny may require different maxima. For instance, any circumstances which permit a special opportunity for theft (*e.g.*, in the postal service) may necessitate a high penalty to act as a sufficient deterrent. The same may be so in the case of thefts of a type which of their nature are difficult to detect. Again, it may be right to maintain the broad differentiation between larceny, which involves a direct violation of proprietary rights, and obtaining by false pretences; but we consider that the same considerations which justify the retention of several categories of larceny would also make appropriate the introduction of several categories of false pretences with different maxima.

One reason why many penalties now seem anomalous is that changes have occurred in the social and moral climate since they were laid down by Parliament. The legal penalties imposed in any society reflect the social and moral values of the period, and the view taken by lawmakers of the potential harmfulness of various crimes to the existing social order. When the social climate changes, the law is changed only after a certain delay during which the law may fall into disrepute and not be enforced. An obvious example from the past is the refusal of many juries to convict for theft during a considerable period before the abolition of the death penalty for this offence.

In the last thirty years, there has probably been a bigger revolution in social values than in any previous hundred years, but our scales of punishment have remained largely unchanged. For example, many existing penalties still reflect the extreme fear with which attacks on the existing order and the sanctity of established institutions were formerly regarded. Thus we find life imprisonment still prescribed for such offences as arson of public buildings, stations and churches; trading with pirates; riot after proclamation; unlawful oaths; malicious damage to river banks, bridges, and railways; destruction of registers; fraudulent cancellation of wills; false entry of stock at the Bank of England (14 years only at the L.C.C.); counterfeiting gold and silver; forgery of wills and deeds; and sacrilege.

Another similar tendency in our system of penalties is for offences against property to command heavier punishment than physical offences against persons, particularly where sexual offences against women and girls are concerned. The long list of property offences (larceny, forgery, arson, etc.), for which sentences of from seven years to life can be imposed, often dating from a time when the defence of property was the main concern of the law, now looks out of keeping with the maximum of two years for a whole range of sexual offences such as procuration by threats, fraud or drugs; detention in a brothel; living on the earnings of prostitution; indecent assault on any woman or girl; and sexual intercourse with a girl of between thirteen and sixteen years of age. A striking example of this anomaly is that the abduction of a woman with intent on her fortune involves a maximum of fourteen years, but the abduction of a girl of fourteen with intent on her virtue only two years. Again, the maximum for cruelty to children is only two years—unless the accused was interested in money accruing on the death of the child, in which case it is five years.

We are not here concerned to say whether the maxima for offences against property are too high, or those against the bodily and moral welfare of persons are too low; we desire only to call attention to the disparity of concern evinced by the present law.

As we indicated at the beginning of this report, any attempt to remove anomalies such as we have referred to, which run right through our criminal law, might well involve reforms which do not come under the heading of revaluation of penalties, but affect the substantive law, and it is obvious that very full inquiry would be needed before any legislation could be prepared.

We would, however, suggest that in a modern system of law any differentiation as to maximum penalty between one crime and another within the same broad category should be based on the motive and intention with which the act is done and on other circumstances (*e.g.*, whether a breach of trust is involved), rather than on the actual loss or damage inflicted by it.

(4) *Should some general rules be laid down as to matters that may be taken into account by way of aggravation or mitigation?* Aggravating circumstances are dealt with in a very haphazard way by English law. Thus the fact that a crime is committed by night is in general immaterial, though a judge could of course take it into account if he thought fit in fixing a penalty within the maximum. We have, however, already mentioned one example of a case where commission of the offence during the night is regarded as an aggravation requiring a higher maximum penalty. A still more striking example is that of breaking into a dwelling-house with intent to steal therein, which is the crime of housebreaking, punishable by seven years' imprisonment, if done by day, but is elevated into the separate crime of burglary and made punishable with life imprisonment if done by night. The fact that the defendant has been convicted of a similar offence on a previous occasion, or on a number of previous occasions, has normally no bearing on the maximum available sentence, though it is one of the principal matters ordinarily considered in fixing the actual sentence and is the basis for the special sentences of Corrective Training and Preventive Detention. For a comparatively small proportion of crimes, however, a higher maximum is fixed for a second or subsequent offence (mainly in the case of some less serious crimes such as betting and driving offences). There are some quite absurd anomalies, *e.g.*, that for the theft of dogs or deer (but not of fish, hares or cattle) the maximum is higher after a previous conviction.

Mitigating circumstances are hardly ever provided for by law, except in the sense that certain statutes require regard to be paid to the youth of the offender or to the fact that he had not been previously convicted. Murder may be " reduced " to manslaughter by certain mitigating circumstances, *e.g.*, provocation, but in general it is left entirely to the judge's discretion to take into account by way of mitigation anything which seems to him to lessen the gravity of the offence.

It appears to us that certain matters to be taken into account by way of aggravation might with advantage be laid down by law so as to apply to criminal offences generally. Thus, in connection with previous offences, the present haphazard provisions for certain crimes to be more heavily punishable after a previous conviction might be swept away and some general rules laid down for higher maxima for persons previously convicted. One advantage of dealing in this way with this and other matters of aggravation would be to enable the ordinary maximum to be reduced so as to be more closely related to what should represent a fitting punishment for the crime in question. At present most maxima are fixed high simply because provision has to be made for the case which may arise only once in many years where the aggravating circumstances are such as to demand a very heavy punishment. It would, we consider, be more satisfactory that the matters which will justify an unusually severe sentence should be laid down by the law than that they should be left entirely to the discretion of the judge.

Similarly there might be a general provision for a reduced maximum penalty in the case of offenders who had no previous convictions, of any kind or of a similar kind.

We consider that some codification of grounds for aggravation or mitigation, and of the degree to which these should affect the penalty, would be of assistance in co-ordinating the sentencing practice of different courts; though we are far from suggesting that any attempt should be made to lay down such precise regulations that the sentence could be arrived at by mere rule of thumb. Whatever guidance is given to the courts by statute, we consider it essential that they should not be deprived of the power to take account of circumstances for which the legislature has made no provision, and to give such weight to them as they think fit, within reasonable limits. A valuable check on any tendency for a particular court to exercise its discretion in a way that is out of line with current practice is provided by the decisions and observations on sentences made by the Court of Criminal Appeal and the Divisional Court.

(5) *Is there a case for having fixed or minimum penalties for some crimes?* Except for the death penalty and the penalty of life imprisonment for non-capital murder, there are practically no fixed or minimum penalties laid down by English law. Under war-time legislation it was provided that for certain offences a fine should be imposed not less than sufficient to ensure that the defendant made no profit from his offence. But the rule is practically universal that the court can impose any fine from a nominal sum up to the maximum (if any) fixed by statute, or any term of imprisonment (or detention) from one day up to the maximum.[6] Many Continental systems of law do fix minima as well as maxima, and fixed penalties are not unknown.

We do not feel called upon to express any opinion on the question of whether sentence of death or of life imprisonment should be the automatic sequel to conviction for the gravest crimes. As to penalties generally, we do not consider that the introduction of minimum or fixed penalties would be advantageous. So long as the court has it in its power to make an order for probation or for absolute or conditional discharge (and we see no reason to think that any limitation is likely to be or ought to be imposed on the discretion to make such orders), it would be illogical to compel the court, if it punishes at all, to impose some fixed or minimum penalty. Moreover, the definition of almost every kind of crime is necessarily so worded as to include some acts which are little more than technical offences; and the possible circumstances of mitigation are so many and various that we consider it should always be open to a court to reduce the penalty to any extent it thinks fit.

CONCLUSION

It has not been practicable for this sub-committee to do more than make a brief survey of the subject of revaluation of penalties, but this has been sufficient to satisfy us that there is a strong case for the setting up of an official committee or commission of inquiry into the matter, either as a separate subject for investigation or, perhaps more profitably, as part of a wider examination directed to finding ways of simplifying, strengthening and rationalising the criminal law of this country.

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[6] On certain convictions for driving offences, however, disqualification must be imposed in the absence of special reasons for ordering otherwise; and for driving while disqualified the punishment is imprisonment unless the court, having regard to special circumstances, considers a fine an adequate punishment.

Note on Classified Tables

The tables which follow are intended to give a general picture of the present range of maximum penalties for indictable offences. They have been condensed from fuller tables prepared by the Committee when it undertook this study. They are not designed as comprehensive lists for legal reference.

No attempt has been made to survey the wide range of minor offences punishable summarily in Magistrates' Courts.

Maximum Penalties Classified in Social Categories

Offences against the State—Security

Treason	Death
Treason felony, inciting to mutiny	Life
Spying	14 years
Illegal training and drilling	7 years
Shooting at naval vessel or aircraft	5 years
Inciting to disaffection, disclosure of information, harbouring spies	2 years

Offences against the State—Public Order

Arson of ships, piracy with violence	Death
Arson of public buildings, stations, mines, churches, stacks	Life
Malicious damage to river and sea banks, bridges, railways, ships, machinery and certain goods	Life
Riot, riot after proclamation, unlawful assembly, endangering safety of railways	Life
Causing explosions	20 years
Attempted arson of public buildings, etc.	14 years
Possessing firearms to endanger life	14 years
Assault on officer saving wreck	7 years
Malicious damage to electric lines, telegraphs, trees in parks (over £1), trees not in parks (over £5)	5 years
Assault on police officer in execution of duty	2 years
Causing disaffection among police	2 years
Signalling to smugglers	1 year

Offences against the State—Coinage and Currency

Counterfeiting gold and silver coins, possessing counterfeiting tools	Life
Impairing gold and silver coins, possessing forged banknotes	14 years
Counterfeiting copper coins, making paper for banknotes	7 years
Possessing 3 or more counterfeit gold or silver coins	5 years
Uttering counterfeit coin twice in 10 days	2 years
Defacing coin, uttering counterfeit coin	1 year

Offences against the State—Financial

Embezzlement by Post Office or Bank of England officials, false entry of Bank of England stock	Life
Forgery of wills, bonds, deeds or banknotes	Life
Larceny and receiving of postal packets	Life
Bribery of public officials	Life
False entry of L.C.C. stock	14 years
Compounding by corruptly taking reward, forgery of official documents	7 years
Personation of Inland Revenue officer, smuggling	2 years
Corruption of members or servants of public bodies	2 years

Offences against the State—General Social Order

Destruction of registers of births, deaths, etc.	Life
Obscene, seditious or blasphemous libel	Life
Sacrilege, blasphemy, gaming, public mischief, inciting to commit crime, conspiracy generally	Life
Offences against Marriage Act, time, place, banns, Holy Orders, etc.	14 years
Contravention of Dangerous Drugs Act	10 years
Bigamy, perjury, personation of bail	7 years
False entries of birth	5 years
Concealment of birth, forgery of passports, perjury in statutory declaration	2 years
Bribery at elections, keeping common gaming house	1 year
Street betting (3rd offence)	6 months (or £50)

Offences against Private Property

Burglary, robbery (aggravated)	Life
Housebreaking and committing felony	14 years
Larceny, by clerk or servant; larceny in house or of cattle	14 years
Damage to cattle, certain goods, and machinery	14 years
Possession of housebreaking implements (2nd offence)	10 years
Housebreaking with intent	7 years
Larceny by tenant or lodger	7 years
Larceny of documents, electricity, plants, trees; and simple larceny	5 years
Larceny of fish, and of hares and rabbits by night	2 years
Larceny of dogs	18 months
Taking motor-vehicle without owner's consent	1 year

Financial Offences against Persons or Firms

Demanding money with menaces	Life
Larceny of wills, conspiracy to defraud	Life
Personation of heir, or of owner of stock	Life
Embezzlement by clerk or servant, forgery of documents	14 years
Falsification of accounts by clerk or servant	7 years
Fraudulent conversion, frauds by directors, sharepushing	7 years
Bankruptcy (non-disclosure of property)	5 years

Financial Offences against Persons or Firms—continued

Cheating at games, false pretences (re securities), demanding money with intent to steal	5 years
Fraudulent mediums	2 years
Bankruptcy: absconding, gambling, etc.	2 years
Corruptly taking money for recovery of stolen dog	18 months
Obtaining credit by false pretences	1 year

Physical Offences against Adult Persons (not Sexual)

Capital or repeated murder	Death
Non-capital murder, manslaughter, attempted murder	Life
Abortion, by use of drugs, poison or instrument	Life
Armed robbery, aggravated assault, attempt to maim, false imprisonment	Life
Abduction of woman for financial gain	14 years
Conspiracy or threat to murder	10 years
Assault occasioning actual bodily harm	5 years
Supplying means for abortion	5 years
Causing bodily harm by wanton or furious driving	2 years
Common assault	1 year

Offences against Children (not Sexual)

Child destruction, infanticide	Life
Abduction of child with intent to steal	7 years
Abandonment and exposure of children under 2	5 years
Cruelty to children with financial interest on death	5 years
Cruelty, generally; abduction of girl under 16	2 years
Allowing child to live in or frequent brothel	6 months (&/or fine)

Sexual Offences against Children and Young Persons

Under 13

Sexual intercourse, incest, permitting defilement	Life
Attempt at sexual intercourse	2 years

13–16

Sexual intercourse or attempt, encouraging seduction, permitting defilement, encouraging prostitution	2 years

Under 18

Abduction of girl for sexual intercourse	2 years

Under 21

Attempt to procure for sexual intercourse	2 years

Sexual Offences against Women

Rape	Life
Attempted Rape, Incest	7 years
Attempt to cause prostitution, procuring by threat, woman exercising control of prostitute	2 years
Indecent assault, administering drugs with intent	2 years
Living on immoral earnings	2 years
Attempt to procure defective, attempting intercourse with idiot or imbecile	2 years

Sexual Offences against Males

Buggery	Life
Assault with intent to commit buggery	10 years
Indecent assault on males	10 years
Incest	7 years
Attempted incest	2 years
Gross indecency with male person	2 years

MAXIMUM PENALTIES CLASSIFIED ACCORDING TO SEVERITY

Under Two Years

Assault, common	Common Law	1 year
Bankruptcy, obtaining credit, etc.	Bankruptcy Act, 1914, s. 156	1 year
Bawdy house, allowing child of 4–16 to frequent or reside in	Children and Young Persons Act, 1933, s. 3	6 months (&/or fine)
Betting (various offences after first conviction)	Betting and Lotteries Act, 1934, ss. 1, 2, 3, 11	1 year (&/or £750)
Brothel keeping (after previous conviction)	Sexual Offences Act, 1956, ss. 33, 37	6 months (or £250)
Counterfeiting coin—uttering	Coinage Offences Act, 1936, s. 5	1 year
Dredging for oysters	Larceny Act, 1861, s. 26	3 months
Larceny of dogs	Larceny Act, 1916, s. 5	18 months
Libel, publishing	Libel Act, 1843, s. 5	1 year
Malicious damage to Post Office letter box	Post Office Act, 1953, s. 60	1 year
Motor-vehicles, driving when under influence of drink or drugs	Road Traffic Act, 1930, s. 15	6 months (or fine)
Obtaining credit by false pretences	Debtors Act, 1869, s. 13	1 year
Signalling to smugglers	Customs and Excise Act, 1952, s. 71	1 year (&/or fine)

Two Years

Abduction, of girl under 16, of girl under 18 or of woman defective for sexual intercourse	Sexual Offences Act, 1956, ss. 20, 19, 21
Assault on peace officer in execution of his duty	Offences against the Person Act, 1861, s. 38
Assault with intent to commit felony	do.
Attempted intercourse with girl under 13 or 13–16	Sexual Offences Act, 1956, ss. 4, 5, 37
Attempts to procure a woman by threats, a defective or girl under 21	do. s. 37
Cruelty to children	Children and Young Persons Act, 1933, s. 1

Two Years—continued

Concealment of birth	Offences against the Person Act, 1861, s. 60
Corruption by or of agents	Prevention of Corruption Act, 1906, s. 1
Drugs, administering to female with view to carnal knowledge	Sexual Offences Act, 1956, ss. 4, 37
Escape, assisting prisoners to	Prison Act, 1952, s. 39
Forgery of documents (generally)	Forgery Act, 1913, s. 4
Indecent assault on females	Sexual Offences Act, 1956, s. 14
Larceny of deer (after previous conviction), of fish, of hares and rabbits at night	Larceny Act, 1861, ss. 12, 24, 17
Larceny of ore, of up to £5 value by tenant or lodger	Larceny Act, 1916, ss. 11, 16A
Malicious damage (various offences)	Malicious Damage Act, 1861
Moneylenders, false statements by	Moneylenders Act, 1900, s. 4 (and /or fine £500)
Motor-vehicle, reckless or dangerous driving	Road Traffic Act, 1930, s. 11
Official secrets, harbouring spies or wrongful communication	Official Secrets Act, 1911, ss. 7, 2
Police, causing disaffection	Police Act, 1919, s. 3
Prostitution, living on earnings of	Sexual Offences Act, 1956, ss. 30, 37
Threatening to publish with intent to extort or induce favour	Larceny Act, 1916, s. 31
Sexual intercourse with girl 13–16	Sexual Offences Act, 1956, ss. 6, 37

Five Years

Abandonment or exposure of child under 2	Offences against the Person Act, 1861, s. 27
Abortion, supplying poison or instruments for procuring	do. s. 59
Assault, actual bodily harm or with intent to rob	Larceny Act, 1916, s. 23 (3)
Cheating at games	Gaming Act, 1845, s. 17
Cruelty to children (where money interest on death)	Children and Young Persons Act, 1933, s. 1 (5)
Drugs or poison, administering with intent to injure	Offences against the Person Act, 1861, s. 24
False pretences, obtaining chattels or money, etc.	Larceny Act, 1916, s. 32
Housebreaking implements, possession of by night	do. s. 28
Larceny of electricity, fixtures, plants, trees, documents of title; simple larceny	Larceny Act, 1916, ss. 10, 8, 7, 2
Malicious damage to works of art over £20 if committed by night	Malicious Damage Act, 1861, s. 51
Marriage, issue of illegal certificates	Marriage Act, 1949, s. 75 (3)

Five Years—continued

Menaces, demanding money with intent to steal	Larceny Act, 1916, s. 30
Smuggling, interfering with Revenue vessels or aircraft	Customs and Excise Act, 1952, s. 72 (2)
Spring guns, setting with intent to inflict grievous bodily harm	Offences against the Person Act, 1861, s. 31

Seven Years

Abduction of child under 14 with intent to steal	Offences against the Person Act, 1861, s. 56
Assault on gamekeeper by poacher	Night Poaching Act, 1828, s. 2
Bigamy	Offences against the Person Act, 1861, s. 57
Corruption when H.M. Government is concerned	Prevention of Corruption Act, 1916, s. 1
Falsification of accounts by clerks or servants	Falsification of Accounts Act, 1875, s. 1.
Frauds by directors, etc.	Larceny Act, 1861, ss. 82, 83, 84
Fraudulent conversion generally	Larceny Act, 1916, s. 20
Housebreaking with intent	Larceny Act, 1916, s. 27
Illegal training and drilling	Unlawful Drilling Act, 1819
Incest by males and by females over 16	Sexual Offences Act, 1956, ss. 10, 11, 37
Larceny by tenant or lodger (over £5), by postal officer of postal packet	Larceny Act, 1916, ss. 16 (*a*), 18 (*b*); Post Office Act, 1953, s. 57
Malicious damage to buoys, fish ponds, mines	Malicious Damage Act, 1861, ss. 48, 32, 29
Perjury as to births, deaths, marriages and judicial proceedings	Perjury Act, 1911, ss. 4, 3, 1
Receiving (where stealing is a misdemeanour)	Larceny Act, 1916, s. 33 (1)
Unlawful oaths, generally	Unlawful Oaths Act, 1797, s. 1

Ten Years

Assault with intent to commit buggery	Offences against the Person Act, 1861, s. 62
Conspiracy to murder	do. s. 4
Indecent assault on males	Sexual Offences Act, 1956, s. 15
Poison, administering so as to endanger life, etc.	Offences against the Person Act, 1861, s. 23
Threats to burn houses	Malicious Damage Act, 1861, s. 50
Threats to murder	Offences against the Person Act, 1861, s. 16

Fourteen Years

Abduction of woman for her property	Sexual Offences Act, 1956, s. 17
Abduction of heiress	do. s. 18
Arson of buildings and crops	Malicious Damage Act, 1861, ss. 6, 16

Fourteen Years—continued

Explosives, making or possessing in suspicious circumstances	Explosive Substances Act, 1883, s. 4
Forgery of valuable securities, registers, seals and dies	Forgery Act, 1913, ss. 2 (2), 3 (2), 5
Housebreaking and committing felony	Larceny Act, 1916, s. 26
Larceny by clerk or servant, and from the person	Larceny Act, 1916, ss. 17, 14
Larceny from ships and docks, in dwelling-houses, of cattle, of goods in process of manufacture	do. ss. 15, 13, 3, 9
Malicious damage to cattle and hopbinds	Malicious Damage Act, 1861, ss. 40, 19
Official secrets, spying	Official Secrets Act, 1911, s. 1
Poaching by three or more armed persons	Night Poaching Act, 1828, s. 9
Receiving any property (if stealing a felony)	Larceny Act, 1916, s. 33 (1)
Robbery	Larceny Act, 1916, s. 23 (2)
Marriage, offences *re* time, banns, place and Holy Orders	Marriage Act, 1949, s. 75

Twenty Years

Conspiracy to cause explosions, etc.	Explosive Substances Act, 1883, s. 3

Life

Abortion, using poison, instrument or drugs to procure	Offences against the Person Act, 1861, s. 58
Arson of churches, mines, public buildings, stacks	Malicious Damage Act, 1861, ss. 1, 26, 5, 17
Attempts to commit crime generally	Common law (and/or fine)
Blasphemy	Common law (and/or fine)
Breaking prison	do.
Bribery of public officials	do.
Buggery	Sexual Offences Act, 1956, ss. 12, 37
Burglary	Larceny Act, 1916, s. 25
Carnal knowledge of girl under 13	Sexual Offences Act, 1956, ss. 5, 37
Cheating generally	Common law (and/or fine)
Child destruction	Infant Life Preservation Act, 1929
Coinage, gilding, counterfeiting gold and silver	Coinage Offences Act, 1936, ss. 2, 1
Compounding offences	Common law (and/or fine)
Conspiracy generally	do.
Corrosive throwing	Offences against the Person Act, 1861, s. 29
Destruction of registers of births, baptisms	Forgery Act, 1861, ss. 36, 37

Life—continued

Embezzlement by officer of Post Office	Post Office Act, 1953, s. 57
False imprisonment	Common law (and/or fine)
False entries of stock in books of Bank of England	Forgery Act, 1861, s. 5
Forgery of wills and deeds and banknotes	Forgery Act, 1913, s. 2 (1)
Fraudulent cancellation of wills	Larceny Act, 1861, s. 29
Inciting to commit crime	Common law (and/or fine)
Indecent prints, selling	do.
Infanticide	Infanticide Act, 1938
Larceny of wills	Larceny Act, 1916, s. 6
Larceny by postal officer (valuable security), or of packet from mailbag	Post Office Act, 1953, ss. 57, 52
Libel, obscene, blasphemous or seditious	Common law (and/or fine)
Malicious damage to bridges, river banks, and railways	Malicious Damage Act, 1861, ss. 33, 30, 35
Manslaughter	Common law (and/or fine)
Menaces, demanding money with intent to extort or injure	Larceny Act, 1916, s. 29
Non-capital murder	Homicide Act, 1957, s. 9
Nuisance	Common law (and/or fine)
Personation of heir	False Personation Act, 1874, s. 1
Personation of owner of Indian Stock	Indian Stock Certificate Act, 1863, s. 14
Pirates, trading with	Piracy Act, 1721, s. 1
Rape	Sexual Offences Act, 1956, ss. 1, 37
Riot after proclamation	Riot Act, 1714, s. 1
Robbery, armed or aggravated or with violence	Larceny Act, 1916, s. 23 (1) (*a*) (*b*)
Sacrilege	Larceny Act, 1916, s. 24
Sexual intercourse with girl under 13	Sexual Offences Act, 1956, ss. 5, 37
Suicide, attempted	Common law (and/or fine)
Unlawful oaths, to commit treason or murder	Unlawful Oaths Act, 1812, s. 1
Unlawful assembly	Common law (and/or fine)

Death

Arson of ships	Dockyards Protection Act, 1772, ss. 1, 42
Capital or repeated murder	Homicide Act, 1957, ss. 5, 6
Piracy with violence	Piracy Act, 1837, s. 2
Treason	Treason Act, 1351, and Forfeiture Act, 1870, s. 1

Mr. Sutterthwick's Court

By A. E. JONES, *Magistrates' Clerk*

A Homosexual Case

Preliminaries

The young detective constable stepped into the witness-box and said, with all the confidence of a little experience, " The police are respectfully asking for a remand in this case, your worship. The accused desires other offences to be taken into consideration, and we haven't had time to complete—"

" Do let's have things in their proper order, officer," interrupted Mr. Sutterthwick crossly. " You tell me before the case has started that the defendant has committed other offences. You can't expect me to try him after that."

" I beg your pardon, your worship. I thought there was no harm in mentioning it, as I understand the accused is pleading guilty," was the somewhat abashed explanation.

" You have no right to assume that. And certainly no right at all to say it. He is the only person who can give information on that point to the court," said the magistrate, even more crossly.

The young officer could find nothing but " I'm sorry, your worship " to say to that. Then remembrance of a pet phrase of one of his seniors gave him an inspiration. " Perhaps it might assist the court to take a consent and plea? " he ventured.

" It might have assisted the court if you'd said that to begin with," was the unmollified reply.

Frell, the clerk, got up and said in an anxious undertone, " If it's a plea of guilty, the witnesses will be saved another attendance, sir. It won't be necessary to offer a remand for another court to try the case unless the defendant is pleading not guilty."

" I realise that," Mr. Sutterthwick murmured back. " I just want to make quite sure that the lesson has been indelibly learned." Aloud he said, " The clerk points out that there would be no harm in finding out whether the accused is disputing the charge, and we may be able to assist witnesses by so doing."

" Thank you, your worship," said the detective constable, partly relieved, but fearful now that what had started badly would continue so, and the defendant would, after all, hotly contest the case or even ask to go for trial. However, Patrick Dallinan had no intention of going back on what he had said outside the courtroom. He had heard, with patient incomprehension, the exchanges between the magistrate and the police officer. He listened now in much the same way to the statutory formula addressed to him by the clerk. He knew what he must say at the end, and his "Tried here, sir" and "Guilty" were unhesitating, when Frell had finished explaining the choices of jurisdiction on the charge of stealing in a dwelling-house a suitcase containing clothing, a gold watch, a gold cigarette case and a pair of gold cuff links, total value £275, the property of one, Jocelyn Braighton.

Substance of the case

The detective constable was able to give the facts of the case with something approaching his original confidence. He related how the defendant, when out of work and homeless, had been befriended by Mr. Braighton and given shelter in his flat; but, after one night there, Dallinan had, during his benefactor's temporary absence next morning, decamped with all the valuable property he could put into Mr. Braighton's best suitcase. The case itself and a small part of the clothing had been recovered; in fact, the defendant was wearing some of the stolen garments. The rest of the property, stated the officer, was said by Dallinan to have been sold to men met casually in cafés and not known by name or otherwise. The way in which the officer proffered this explanation indicated that he was not so inexperienced as to believe it, but was experienced enough to know that the prisoner would not betray the smelter of illicit precious metals who had bought the missing gold articles.

"How did he come to be arrested? How was he traced?" inquired Mr. Sutterthwick.

"On information received, your worship," was the diplomatic reply, after a moment's hesitation; and the magistrate did not pursue the matter. His next question, after Dallinan had agreed that what the detective had said was all true, was, "What can you tell me about this young man—apart from this unpleasant story? It sounds a shocking case of rank ingratitude."

"Yes, your worship," said the officer rather dubiously, and went on, more happily, "The prisoner, your worship, is a single man, aged eighteen years, and was born in Cork. After leaving school at the age of fourteen he worked first as an errand boy and then as a building contractor's labourer. When that contract was completed he had difficulty in getting other work, and finally came to England some eight months ago. He obtained employment almost immediately on the new by-pass road here, but gave up that job seven weeks ago, and has done no work since. He has not signed on at the Employment Exchange and is not drawing any benefit from national funds."

"How has he been living then?" asked the magistrate.

"He says friends have helped him, and he had some savings," replied the detective, and added, "He has made a written statement under caution which your worship might like to see."

The prisoner's statement

"Read it out," said Mr. Sutterthwick. The officer showed obvious signs of dilemma at this direction; clearly he feared further judicial censure whether he complied or did not comply with it. After some seconds of inner deliberation he said, "I think, with respect, that your worship should look through it first, before deciding that it should be read out in public." Mr. Sutterthwick raised his eyebrows at this but indicated acquiescence. Sergeant Quing, the warrant officer, handed the document to him, and a copy of it to the clerk.

The magistrate studied the prisoner's statement carefully for some minutes and then said, "You were quite right, officer. This is not the sort of statement which it would be desirable to read out in court—at least, not at this stage. It will be sufficient if I say, in general terms, that the defendant alleges that homosexual relations took place between himself and the prosecutor; I need not go into the details . . . I take it that Mr. Braighton has been informed of this?"

"Yes, your worship; and he strenuously denies it . . . Of course, your worship will appreciate that there is no corroboration of this young man's story—and no likelihood that any corroboration could ever be forthcoming, so far as the police can see. Mr. Braighton lives alone in his flat."

Mr. Sutterthwick considered for a moment before saying "Yes, I can see that no prosecution could reasonably be undertaken merely on the strength of this statement. It could so easily be an attempt by the defendant to exculpate himself—or revenge himself for having been prosecuted."

Once again Frell rose from his seat and spoke confidentially to the magistrate. "You will see, sir, that towards the end of his statement he actually says, 'I really only took the gear because of what he did to me. I thought I was entitled to some compensation.' If he genuinely thought he had a right to do this, it would be a good defence to the charge of larceny—even although it wasn't a legal right," said the clerk.

"I don't think he means it to be taken that way, but I agree we must have the point quite clear," replied Mr. Sutterthwick. To Dallinan he said, "I want to be sure about this. When you took this property belonging to Mr. Braighton did you belive you had a right to take it?" The prisoner pondered this for some seconds and finally said, "Well . . . no . . . not exactly a right, really, your honour . . . but I thought I was only paying him back for what he done."

"Yes; that's what I'd understood," said the magistrate. Frell had to content himself with the reflection that it is always the precaution a clerk omits which brings disaster.

Mr. Sutterthwick turned to the detective constable again and said, "You indicated earlier on that there were other matters the police wished to inquire into. Are there likely to be further charges of a similar nature against this defendant?"

"No, your worship—not so far as I know. The prisoner has given us information about the taking away of a motor vehicle and the use of it without a third-party insurance policy. That is why we are asking for a remand."

"I see," said the magistrate, "Quite a different type of offence; and much less grave—though serious enough. In all the circumstances I think I can properly ask the probation officer to see him now, without waiting for the remand hearing."

Probation Officer's report

Thorburton got up and said, "I have already seen him, sir. He made a point of asking to see me as soon as he arrived here."

"What do you make of him?" asked Mr. Sutterthwick.

"I'm not very favourably impressed at the moment," replied the probation officer. "I think he only called for me because he thought I could get him out of trouble cheaply. He's clearly gone very much to the bad recently, and got into some very doubtful company, to put it mildly. He frequents clubs and cafés which are well-known resorts of perverts in the district; and he has admitted quite frankly to me that he has been getting money by homosexuality since he left his job. I'm not saying anything about the prosecutor in this case, of course, but you will note, sir, that Dallinan, in his statement to the police—which the officer was good enough to show to me—says he realised straightaway that he had been picked up by a 'queer,' as he puts it; but he made no objection to going to this flat. That shows his attitude to this sort of thing."

"It seems to be becoming too common an attitude," said Mr. Sutterthwick. "I get the impression, sitting here, that we've got the same problem on our hands with some of these young lads as we have with some young girls—the problem of how to wean them from the idea that prostitution is a good way of getting easy money."

"I agree, sir," said Thorburton. "I think that in this case a period of training and discipline would be necessary before young Dallinan could safely face the temptations he may meet in a big town. There is an approved home I know of which is very good with boys of this type—provided they haven't gone too far on the wrong road; but I don't know at the moment if the warden has any vacancies. If a probation order with a condition of residence was in your mind, sir, I could find out during a remand whether this home would accept this youth."

Remand

"I haven't made up my mind at all about him," said the magistrate. "But there will have to be a remand for the police inquiries. That will give you an opportunity to make your inquiries too. Do you think a medical report might be helpful?"

"The warden of any hostel or home would want to be assured that he had a clean bill of health, before accepting him, sir. That would particularly apply in a case like this."

"Yes, I think it may well be in the defendant's own interests to be medically examined," said Mr. Sutterthwick. He turned to Patrick Dallinan and announced, "I propose to remand you in custody for a week, and to ask the prison doctor to report on you. Is there anything you want to say to me today? Or will you say what you have to say, next week?"

"Nothing to say," mumbled the defendant with a rather resentful glance at the probation officer. The assistant gaoler led him away, and the magistrate said, "I'd like to see the prosecutor, Mr. Braighton, for a moment."

The prosecutor

A well-tailored, middle-aged man with a prim look came into the witness-box and faced the bench with a desperate attempt to appear composed and at ease.

"You know what this young man has alleged against you," began Mr. Sutterthwick.

"Yes, sir. I need hardly say it's a monstrous lie," interrupted the prosecutor in a prim voice made shrill by excitement. "Really I can't understand how anyone could say such a thing . . . I thought I was doing him a good turn. I never dreamt that this would happen and he would turn out such a young rascal."

"You're not here to defend yourself against any charge," broke in Mr. Sutterthwick. "No prosecution has been brought in respect of these allegations and I have no authority to investigate them. I wanted to see you merely to give you a word of advice. It's a dangerous thing to pick up a complete stranger and take him home with you to spend the night—especially if you live alone—"

"I realise that now, sir," put in Braighton. "I was a perfect fool, but meant no harm. He told such a pathetic down-and-out hard-luck story that against my better judgment . . ."

"It's dangerous not only because he may rob you—as this young man did," pursued Mr. Sutterthwick steadily. "It's dangerous in other ways too—as I hope you see now."

"I do indeed, sir," was the fervent reply. Seeing that the magistrate had apparently finished with him, the prosecutor was emboldened to add: "This has been a great loss to me. It's not so much the intrinsic value of the articles, but some of them have great sentimental value. The gold watch belonged to my father, and the gold cigarette case was a twenty-first birthday present from my mother . . . I don't want to be hard on this misguided youth and if he would only reveal where he disposed of those articles—"

"I think you can consider yourself lucky that you've come no worse out of this adventure, Mr. Braighton," cut in the magistrate. "That is all. Stand down please." When the witness-box was empty he leaned towards Frell and whispered, "I don't think I dared say any more in the circumstances."

Eire and Extradition

By Andrew Phelan, *Barrister-at-Law*

"I will make an order . . . that the Defendants (the Attorney-General of the Irish Free State and the Commissioner of Police) . . . are hereby perpetually restrained from arresting the Plaintiff as a fugitive offender or escaped convict under the alleged conviction or offence . . . in pursuance of any warrant issued by an external authority."

This injunction against the Irish Free State authorities granted in *O'Boyle* v. *Attorney-General and O'Duffy*[1] arose from an application by a man who had been convicted in Northern Ireland of murder, served part of a commuted sentence and subsequently escaped to what was then the Irish Free State. Warrants for arrest issued in Belfast were backed in Dublin, and the applicant alleged, therefore, that he was in danger of arrest, that such arrest would be unlawful and that an injunction should issue. His application succeeded and the legal position confirmed by the court has remained unaltered by the lapse of twenty years.

Much of the 200 miles which form the frontier between Northern Ireland and Eire is a lonely countryside of small fields and devious lanes, virtually impossible to seal to unauthorised passage. It is reinforced by no natural barriers, such as a river or mountain range, but, indeed, regardless of geography, often bisects an individual farm or village street. It is a smuggler's dream. It is also a headache to forces of law and order and one may sympathise if the Northern Ireland authorities regard the impossibility of legally extracting fugitives from across the frontier as almost an incentive to crime. In a recent bomb outrage the explosion was apparently effected from Eire by the use of cables laid across the Border.

The handing over by the Republic of Ireland of persons charged with offences in other countries, and vice versa, is in fact governed by three kinds of procedure. Under the Extradition Acts, 1870 to 1906, the Republic of Ireland is under treaty obligations with foreign States. Secondly, the Fugitive Offenders Act, 1881, governs the procedure when the Republic of Ireland and countries within the British Commonwealth deal with the question of fugitive criminals. By this Act, where a person accused of having committed an offence in one part of Her Majesty's dominions has left that part for another part, he is liable to be apprehended under an indorsed warrant or a provisional warrant and returned to the part from which he is a fugitive. The alleged facts are given in evidence and the fugitive is only handed over if there be a " strong or probable " presumption of guilt.

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[1] [1929] Ir.R. 558.

In *The State* (*Kennedy*) v. *Little*,[2] a case where the Canadian authorities applied for the extradition of a fugitive in Dublin who had been charged in Canada with obtaining money by false pretences, it was decided that the Act of 1881 continued to be in full force and effect in the Irish Free State, having, like many statutes, been retained as part of the law in the new State by the effect of section 73 of the Irish Free State Constitution, 1922. The Fugitive Offenders Act, 1881, in the words of an Irish judge, " encircles the person charged with a complete network of safeguards to ensure that no injustice is done " and, in the Republic of Ireland, the handing over of a fugitive is finally effected only if the appropriate Minister " thinks it just."

But a third kind of procedure governs the apprehension of fugitives charged with offences in England and Wales, Scotland, or Ireland. It consists of a simple indorsement of warrants for arrest under reciprocal provisions contained in the Indictable Offences Act, 1848, s. 12, and the Petty Sessions (Ireland) Act, 1851, ss. 27 and 29, as amended by the Petty Sessions (Ireland) Act, 1867. The Fugitive Offenders Act, 1881, has, therefore, no application to such proceedings.

This point was not authoritatively decided by an English court until the decision in *R.* v. *Commissioner of Police, ex p. Nalder*.[3] In that case a warrant was issued by a justice of a District Court in Eire for the arrest of a British subject charged there with an indictable offence. The warrant was in the form prescribed by the Petty Sessions (Ireland) Act, 1851, and was duly indorsed at Bow Street. The offender was arrested in London, and, pending his removal to Eire, an application for a writ of habeas corpus was made on his behalf on the ground that his detention was illegal and that the proceedings, if any, should have been taken under the Fugitive Offenders Act, 1881. The court held that the proceedings had been properly brought and that the offender was, therefore, in lawful custody.

This decision conforms with the view taken in Eire in *The State*

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[2] [1931] Ir.R. 39.

[3] [1947] 2 All E.R. 611.

(*Dowling*) v. *Kingston* (*No.* 2).[4] There, a sheriff-substitute in Scotland issued a warrant for the arrest of an Irish citizen on a charge of failing to maintain his wife and child in Scotland. The warrant was brought to Dublin and indorsed by an Assistant Commissioner of Police. The fugitive was arrested in Dublin and the lawfulness of this arrest was subsequently upheld by the Supreme Court. A new Constitution was adopted in Eire in 1937 but, on an appeal arising from habeas corpus proceedings in *The State* (*Duggan*) v. *Tapley*,[5] the Supreme Court of Eire again held that the lawfulness of this century-old mutual indorsement of warrants is still unaffected.

Northern Ireland, of course, did not exist when the Indictable Offences Act, 1848, and the Petty Sessions (Ireland) Acts were passed, but " Ireland " in these Acts covers Northern Ireland today and that country therefore applies them in the same manner as does the Republic of Ireland, so that the only gap in the network is between that country and Northern Ireland.

The indorsement of a warrant is a simple procedure and the process is often used in cases where a warrant has been issued for the arrest of a husband on a charge of failing to comply with maintenance orders in respect of wife and family and it is discovered that he has gone to Eire. Hardships resulting from cases of this kind have been emphasised since other loopholes were stopped by the Maintenance Orders Act, 1950 (which provided for the reciprocal enforcement of orders for maintenance within England, Scotland and Northern Ireland), and under the Maintenance Orders Act, 1958, which provides for the attachment of wages, the incentive for the defaulting husband to abandon his employment in this country and return to Eire may be increased.

Those concerned with the preparation or indorsement of a warrant should note the recent insistence of the English and Irish courts on due formalities being observed. *Re Melia* [6] shows that it must be technically correct. In that case an Irish warrant had been indorsed by the learned magistrate at Clerkenwell by the long-standing method of signing a separate form containing the necessary words and then pinning this to the warrant. The Divisional Court ruled that this practice was incorrect. The back of the actual warrant must be signed. In *The State* (*Rossi and Blythe*) v. *Sgt. S. J. Bell* [7] the High Court in Dublin considered warrants for arrest issued by a London magistrate and indorsed in

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[4] [1937] Ir.R. 699.

[5] (1953) 87 I.L.T. 86.

[6] [1957] 3 All E.R. 440.

[7] [1957] Ir.R. 281

Dublin. The two men charged were not named in the warrants but were described as to height, age and colour of hair. In granting the habeas corpus applications the court held the warrants to be bad. They should have clearly identified the men by surname and Christian name or, if the names were unknown, that fact should have been stated and the persons identified by such sufficient description as to leave no reasonable doubt of identity.

The simple procedure of mutually indorsing warrants was created when England, Scotland and Ireland were one kingdom and is preserved more for its convenience than its constitutional justification. Its possible results have been described by a judge of the Supreme Court of the Republic as "rather startling." A fugitive may be sent, without the safeguard of necessary prior inquiry, into another State, where he may be tried for offences which are not against the law in the country of refuge. Thus, if British legislation were to make the posting of a sweepstake ticket illegal and provide that the offence was to be deemed to have been committed in the place of delivery to the post, persons might be deported from the Republic to Britain for offences which were not offences in Irish law and which, if they were, would not, by Irish law, have been deemed to have been committed in Britain.

The fact that when the Petty Sessions (Ireland) Act, 1851, was passed the eventual division of Ireland into two jurisdictions could not be foreseen has therefore left today no lawful means for the arrest of fugitives from across the Border and the fleeing thief is apprehended only by police co-operation in unlawful acts and his inability to make a habeas corpus application in time.

There is no provision for mutual indorsement of warrants, the Fugitive Offenders Act of 1881 has no application and any endeavour to establish an extradition treaty would meet the political objection, reasonable from the point of view of Eire, that this would imply an acceptance of a degree of constitutional autonomy and permanence in Northern Ireland which the Republic has always been unwilling to confirm. In any case, since extradition normally excludes offences of a political character, such a solution might raise more difficulties than it could solve.

The Preparation of Important Documents

By WILSON R. HARRISON, M.SC., PH.D.

Director of the Home Office Forensic Science Laboratory, Cardiff

It is sometimes said that crime does not pay; very few document examiners of any experience would readily accept this statement. Rather would they misquote the words of a very famous man " never have so many profited so much for so little as have the successful forgers of documents ". A few moments of sometimes not very skilful work with an eraser or a pen—preferably a ball-point—may divert vast sums of money into the pockets of those who practise this lucrative profession.

It is impossible to make more than a rough guess at the annual harvest reaped by the forger, but a generation ago, Osborn, the famous American authority on forgery, quoted in his *Questioned Documents* a figure of between ten and thirty millions of dollars for the United States alone. Judging from his own experience, the author has little reason to doubt this figure or that a proportionate annual loss is suffered on this side of the Atlantic.

In view of this, it is strange that although many thousands of closely printed pages—and the author himself has been responsible for more than a few—have been filled with details of methods for exposing forgery, surely a case of closing the stable door after the horse has escaped, very little has been published on the steps which should and which can so easily be taken to protect important documents from the attentions of the criminally minded. Protection is stressed, for experience teaches that the alteration of a genuine document is the simplest and therefore the most commonly encountered type of forgery. The subtle modification of a genuine document will generally present far fewer problems to the forger than the fabrication of a completely spurious document, which is a task beset with many pitfalls.

It must not be forgotten that care taken in the drawing up of an important document may well be repaid in a manner far removed from mere protection from the attentions of the forger. Grave issues may hang upon the possibility of establishing a document as genuine and it is by no means unheard of for a perfectly genuine document which has been carelessly drawn up to be attacked, sometimes successfully, as fraudulent.

It sometimes happens that where but a small amount of written matter such as a single short signature is in question, the most experienced document examiner is unable to afford any real assistance in deciding whether the document is genuine or fraudulent.

Even at the time of writing the author is endeavouring to determine the authenticity of two disputed signatures on a document drawn up but a few months ago. The difficulty stems from the fact that both signatures are written on porous paper with a defective ball-point pen filled with ink which "strikes" extremely badly so that both are steadily being transformed into vague blue streaks devoid of the detailed structural details which alone will enable their authenticity to be tested.

As might be expected, documents drawn up by the parties themselves are most susceptible to attack, thus confirming the old adage that a man acting as his own lawyer has a fool for a client, but even documents drawn up by the most reputable firms of solicitors have been known to exhibit such obvious weaknesses that they have been wide open to the attentions of the forger or successfully attacked as falling short of the standards of authenticity required when the witnesses were no longer available to testify to their genuineness.

When considering how best a document may be drawn up so as to render the task of the forger as difficult as possible it may be helpful to study the way in which a genuine document can be fraudulently modified. The operations of the forger may be roughly summarised under five main headings. These are (1) Trimming of sheets, (2) Addition or subtraction of whole sheets, (3) Additions, both interlinear and marginal, (4) Erasures, (5) Substitution of names, dates, amounts, etc. over the sites of erasures together with alterations in figures.

Trimming

Trimming of the sheet is usually resorted to for the removal of both undesired clauses from agreements and of inconvenient dates; it is far safer to trim off an unwanted date and then insert a new version which may be examined in vain for evidence of alteration or erasure, than to risk making an alteration which might be revealed on laboratory examination.

Where clauses are concerned it should be borne in mind that it is not only those which appear at the top or bottom of a sheet which can be removed by judicious trimming. Any document drawn up on heavily loaded paper of poor quality will, on being subjected to rough handling, tend to split along a fold. It is not unknown for a narrow strip of paper bearing an unwanted portion of the text to be removed from the middle of a sheet and the two remaining portions joined by stamp-edging or cellulose tape in the confident expectation that the breakage will be attributed to wear and tear with no suspicion that an essential portion of the document is no longer present.

Numbering the paragraphs or the clauses cannot be regarded as a complete protection against fraudulent trimming for a slight paring of a left-hand margin might well suffice to remove numbers which have unwisely been placed too far from the text.

To protect an important document against fraudulent trimming, it should first be drawn up on good quality paper, preferably one with a rag base. The sheets should be of a standard size (for any document on paper of unusual dimensions is invariably regarded with suspicion by the experienced document examiner) with an ample margin remaining on the left-hand side so that any trimming sufficiently drastic to influence the text will necessitate the removal of sufficient paper to make the sheet appear abnormally narrow.

Alternatively, where the paragraphs or clauses are to be numbered, the numbers should be deeply inset so that their removal by trimming will necessitate interference with the text. Where the date is of importance it should be incorporated into the text, preferably in words rather than in figures which can so easily be altered or misread.

The reason for the use of paper of high strength may not be obvious; if this precaution is taken, any tears in the document, whether repaired or otherwise, will be regarded as, in the absence of evidence to the contrary, deliberately caused, because paper of good quality will undergo considerable maltreatment in the shape of frequent folding and unfolding without exhibiting any tendency towards splitting along the folds.

Guarding against substitution of pages

The substitution or addition of pages can best be guarded against in a manner well-known to those whose task it was to draw up important documents in the past. Wherever possible a single sheet of parchment or of paper was used, and to produce a document of convenient size this sheet was folded once or twice to give two or four leaves. Nowadays, when the use of a typewriter is regarded as essential, it is impracticable to follow this precept especially when carbon copies are required, so that documents may have to be assembled from a number of separate sheets.

Whenever a document is composed of more than a single sheet, care should be taken to bind the sheets together in such a manner that it will prove impossible to separate them, an essential preliminary to fraudulent substitution or addition, without leaving abundant evidence of the operation. For such a purpose, ordinary paper clips or wire staples are useless.

Whilst it is good practice to use a machine which punches a hole and then crimps a circular brass eyelet into position in the one operation, for the highest measure of protection against the substitution of pages the brass eyelets which fasten the sheets together should be threaded with a thin ribbon or cord. The ends of this ribbon should then be secured under a seal, either wax or adhesive, on the sheet which carries the signature.

Full directions for carrying out this operation neatly and conveniently are given by Osborn in *Questioned Documents*, but for the benefit of those who cannot conveniently consult this book, these directions are quoted, by permision, in an appendix. [See also Figure 1, p. 433.]

As the presence of an odd sheet of paper in a multileaved document may at some later date draw suspicion upon it, it is a safe rule to make the document from sheets of the same type of paper, from the same packet where possible.

Wax Seals

When preparing a wax seal it is false economy to melt down and use odd scraps of wax, for where a wax seal on a document whose authenticity is being challenged can be shown to be composite it is immediately regarded with suspicion. In the absence of definite evidence to the contrary, a seal containing a mixture of waxes is regarded as almost certainly to have been tampered with and repaired.

Guarding against fraudulent additions

Much can be done to prevent fraudulent additions being made to existing pages by taking precautions which, once again, are largely a matter of common sense. As a first precaution, unduly large gaps should never be left between paragraphs or at the bottom of the page no matter how pleasantly a well-spaced text may fall upon the eye. It is especially important that the signature should follow closely upon the end of the text.

Any document, whether important or not, which displays a gleaming expanse of blank paper between text and signature will present an irresistible temptation to the fraudulently minded. Whilst it is a simple matter for the forger to insert something to his advantage in the space so considerately left vacant, this is not all. The document itself may be of such small importance that it can readily be sacrificed by trimming off the text to yield a blank sheet of paper, somewhat restricted in area it is true, but which bears a genuine signature which might well be used to advantage as the final sheet of a multileaved forgery which might well stand up to the most rigorous scrutiny.

If, by any chance, it is necessary to leave an unduly generous margin at the foot of a sheet, it is safer to sign just below the text, or if this course cannot be taken, to draw slanting lines which will prevent undesired additions. This may seem a counsel of perfection, but on one occasion the author was asked to examine a document in which but two lines of typescript had been fraudulently added at the foot of an intermediate sheet to form an additional clause in an agreement which had the effect of enhancing its value by something over four hundred thousand pounds.

Where conveniently placed margins are not available, fraudulent additions can take the form of interlineations. Whilst there is no absolute protection against such tampering, such additions are more likely to be regarded with suspicion if similar non-fraudulent interlineations are absent from other parts of the document so the moral is obvious: when drawing up a document, see that it is free from irregularities of this nature.

Additions to typewritten documents

In spite of the inconvenience this course may occasion it is safest to have the whole of even a lengthy document prepared on a single typewriter without the machine being used to any considerable extent in between the typing of the various sections. It is especially important to ensure that each page is typed *without removal and re-insertion into the machine.* These precautions are necessary both to protect the document from subsequent attack as being a composite, and to render apparent any fraudulent additions.

It might be thought that it is a comparatively simple matter to re-insert a typewritten document into a machine so that fraudulent additions may be unobtrusively made. Whilst a skilled typist can accomplish the re-insertion so neatly that no obvious discrepancy in alignment obtrudes itself on the notice, to defeat the test-scales used by the document examiner, a most exceptional degree of skill is necessary. This means that if, after careful examination of a suspect typewritten document, an experienced document examiner is unable to demonstrate the presence of that degree of misalignment which clearly points to re-insertion, there will be little support for any thesis that typescript has been fraudulently added.

Successful tampering with a properly drawn up typewritten document is never an easy matter and the main difficulty experienced by the would-be forger is in obtaining access to a machine which is sufficiently like the original typewriter on which the document was prepared. If even a lengthy document has been typed on the one machine at a sitting, any additions, unless made on the same machine before it has received much more use, will stand out like a sore thumb. If, however, in the preparation of the document more than one machine was used, or the same machine was used at long intervals of heavy use, it might prove difficult to establish the presence of fraudulent additions. Alternatively, a genuine document not typed in accordance with the above recommendations may be successfully attacked as fraudulent in after years when the circumstances governing its haphazard production cannot be adduced as a reasonable explanation for its apparently hybrid nature.

For the preparation of important documents a machine in a good state of repair should be used. With a worn machine the alignment of the typescript may be so variable that additions can be made with impunity or, alternatively, certain genuine portions may be successfully attacked on the ground that they are later additions.

Protection against erasure

In brief, erasure may be effected either by abrading the colouring matter of the ink or typescript from the surface of the paper or by applying chemical solutions which convert the colouring matter into colourless soluble materials which either soak into the paper or are removed by blotting. Although there are a variety of laboratory methods for exposing erasures, experience has shown that entries on thick matt-surfaced yellow-tinted paper can sometimes be so completely erased that no evidence of erasure can be adduced no matter how thorough the subsequent examination.

On the other hand the use of a thin, glossy-surfaced paper can be relied upon to make unobtrusive erasure by abrasion impracticable and, if the colour of the paper is a clear white, the site of a chemical erasure will be revealed by the development of a distinct yellow tinge.

Whilst non-fraudulent erasure through natural agencies such as light-fading or smudging through accidental contact with moisture may prove a serious embarrassment, there is no reason, if proper care is taken, for any important document to be susceptible to trouble from either source.

Where inks are concerned, " record ink " based on iron gallotannate is easily available and unblotted entries made with such an ink can be relied upon to be resistant both to fading by light and the action of water. Contrary to general belief, record ink is quite as suitable for use in a fountain-pen as any of the special inks sold for the purpose. If, however, the use of this rather acid ink is objected to, the modern alkaline quick-drying inks of the " Superchrome " class should prove equally reliable. Should it be thought desirable to employ a coloured ink, those of the Superchrome class which contain copper or other such metal compounds as part or whole of the colouring matter should be used if resistance to fading is required.

Ordinary fountain-pen inks, especially those described as " washable," are unsatisfactory in many respects where permanence is required. Not only do the majority of these inks fade very readily and the writing " run " when the document is wetted, but their complete removal from the paper by gentle bleaching is easily effected. Once writing with such inks has been bleached, either by the action of light or chemicals, it is rarely that it can be restored or even deciphered. On the other hand, the complete removal of writing made in unblotted record or Superchrome inks is almost impossible to accomplish.

The reasons for the warning, which cannot be too often repeated, that the ball-point pen should never be used for signing important documents are given below, but even for the drawing up of the body of the document the use of such an implement should never be contemplated. Some ball-point inks fade most rapidly with no hope of restoration, whilst others " strike " to such an extent that on some papers writing rapidly degenerates into indecipherable coloured streaks.

Susceptibility to rapid fading is a common fault of typescript and of carbon copy made with ordinary coloured carbon papers; to ensure a reasonable degree of permanence, special " permanent " ribbons and carbon papers which make impressions heavily loaded with carbon in addition to dyestuff should invariably be employed.

Alterations

Where an important document is concerned, mistakes should never be corrected or additions introduced by means of erasure or alteration. The only safe rule is that when an addition has to be made or some mistake corrected, the whole sheet should be retyped.

This may seem a counsel of perfection but it is indeed worth while, for if those putting forward a document which has been fraudulently altered by erasure in some important particular can point to erasures or alterations which have been made in unimportant entries on the same sheet, this will support in some measure their contention that the fraudulent entries might very well have been made legitimately at the time of preparation.

If an alteration has to be made to a document which, in the circumstances, cannot be re-drawn in its entirety, the original entry should be struck out with a light ink-stroke and the correction inserted in the margin or in the vicinity of the cancelled entry. The alteration should also be initialled. As a further precaution, a reference to the alteration could be made and signed at the end of the document.

No attempt should be made to alter any original entry as it stands; still less should it be erased and the amended entry made on the site of the erasure.

Pencil entries

These have no place on any important document either as a permanent feature or as a temporary marking which can be erased once it has performed its function as a place-indicator—the usual reason for the presence of pencil on a document.

Although pencil entries are affected adversely by neither water nor strong sunlight, they are easily erased, often without trace, and can become practically illegible through abrasion arising from the relative movement of the sheets when the documents are handled.

When temporary pencil marks are erased, the document becomes disfigured with an erasure which well might have the effect of seriously damaging its reputation should its authenticity ever be called into question. This applies with especial force to those pencil marks which are foolishly placed in position to indicate where a client has to sign on a document drawn up by a solicitor.

When this is done, some clients stupidly ink-in the pencilled outlines provided, without making any attempt to write their natural signature. The result is that whether the pencil line is erased or not, the "signature" has many of the hall-marks of a traced forgery. Even if a normal signature is written without any attempt to trace over the pencil marks, the presence of pencil in a disputed signature is certain to be regarded with suspicion. If the pencil marks are erased after signing, a practice favoured by many a clerk "to clean up the document before photostating" as one explained it to the author, the document will stand little chance of being accepted as genuine should its authenticity ever be strongly challenged. Erasures invariably arouse suspicion; when they occur in the neighbourhood of a signature, doubly so.

When signing, the normal signature should always be insisted on even if it involves the use of initials instead of the full name. The majority of persons have a way of writing their signature which differs appreciably from their other handwriting. If one of this large group of persons is forced to sign a document with the full name, the signature might differ appreciably from the usual abbreviated signature.

As this is the case wherever, for complete identification, a document has to be signed with the full name, the ordinary signature should first be written and then followed with the full name in brackets.

Reliability of signatures as a means of authenticating a document

Anyone who relies upon a typewritten document authenticated by but a single signature may have a rude awakening; it is not unknown for a genuine signature to be disavowed. Many wealthy men are elderly and on a number of occasions the author has received for examination documents where the signatory has disclaimed all knowledge. On occasion, it has happened that while the signatory has confessed himself unable to recall putting his signature to a document, he has expressed his willingness to honour it providing a laboratory examination has failed to disclose any evidence of forgery.

In general, however, a genuine signature is disavowed when the signatory wishes to escape from the obligations he has assumed when signing. This action will put the person relying on the signature into a difficult position, for if he unsuccessfully presses his claim, he will run the risk of criminal proceedings for uttering a forgery.

It might well be thought that where a signature, particularly that of a wealthy man, is in question, a document examiner would be in a position to prove its authenticity, but this is not necessarily the case. The author has examined the signatures of many famous financiers which have been so poor in quality that he has been unable to express and justify any definite opinion as to their authenticity. Many have been totally illegible, consisting of but a carelessly made initial letter or so, followed by a short wavy line.

In view of this, anyone relying upon a signed document should bear in mind that the degree of positiveness to which the authenticity of a signature can be proved depends in large measure upon the amount and character of the handwriting. As a badly written signature may be repudiated at will with little prospect of the victim being able to establish its genuineness in the face of a definite disavowal, certain precautions should be taken before accepting a signed document upon which reliance may have to be placed at a later date.

The first is to ensure that the document has been properly drawn up on a sheet of paper of standard size; tiny scraps of paper should never be accepted as it is so easy to suggest that these may have been trimmed from a document bearing a genuine signature.

Wherever possible, the whole document should be written out in the handwriting of the signatory. Whilst a signature may be disavowed on the grounds that it is a forgery, it is a rash man who asserts that a whole document has been fabricated in an exact copy of his handwriting.

If the document is to be typewritten, it should, where possible, be typed at one sitting on a typewriter in the possession of the signatory. The carbon copy should be signed by both parties. If this is done, it is difficult to sustain untrue allegations that the document was reinserted into the same machine after signing for the inclusion of fraudulent additions.

The next and perhaps the most important step is to have the signature suitably witnessed. The word "suitable" is stressed, for this will exclude persons of little repute who may be untraceable or suffer from loss of memory should the authenticity of the signature be challenged.

When signing anything but a holograph document, it is as well to have the signatory add a few words in his handwriting, such as a short statement to the effect that he is signing of his own free will in full understanding of what he is signing. This will afford a certain measure of protection, for few forgers will attempt to write a whole sentence in a copy of the handwriting of the victim. In the event of a dispute, the document examiner will have much more material on which to base his opinion.

It is well known that the handwriting of someone seriously ill may deteriorate to a considerable extent over a short period of time. This should be borne in mind by legal advisers who have to draw up wills for those who are so gravely ill that they are unable to write anything like their normal signatures. In such cases, a few lines of writing such as those suggested above may save a considerable amount of litigation. The endorsement added to the signature will not only tend to establish the genuineness of the signature but will also afford some indication of the testamentary capacity of the testator.

Protection of signatures against forgery

Anyone can protect his signature from the attention of the forger by cultivating a simple rhythmic style of writing with attention being paid to correct shading of the strokes. Any garnishing of the writing with a multitude of meaningless strokes and flourishes may result in the production of what at first sight may appear to be a highly individual signature but it is likely to present the forger with few problems.

The forger can cover up the necessarily patched appearance of his work with a mass of similar flourishes, but where a simple well-shaded rhythmic signature has to be copied, it is only the most skilful penman who will have the pen control necessary to produce a convincing forgery. It is well to bear in mind that a forger is unable to make a successful copy of the signature of anyone who is a better writer than himself.

The filing of documents

Nothing so limits the useful life of a document as constant folding and unfolding accompanied by its being thrust into an envelope which is too tight a fit. Whenever possible, a document should be preserved unfolded between slightly over-sized sheets of cardboard and the whole protected from light and dust by an easy-fitting envelope made of cartridge paper of good quality. Preserved in this way, a document on paper of good quality should last for centuries, with any writing or typescript remaining legible to the end.

From the foregoing, it will be seen that the steps which should be taken to draw up documents which will serve their purpose and hold out little prospect of easy gains to the forger are simple and largely a matter of common sense. If the simple rules are followed, much unsatisfactory and inconclusive litigation will be saved and the annual toll taken of the community by the forger will be appreciably reduced.

APPENDIX

Figure 1 (p. 433)

Fold the cover paper over at the upper end leaving a flap one-half inch in width. Put the upper ends of the two or more pages of the document under the flap and punch five holes with an eyelet-setting punch, the end holes not more than one-half inch from the right and left edges and the middle two holes one-half inch apart in the middle of the sheet. The second hole from the right should be about two inches from the right side. Set eyelets in the two end holes under firm pressure. Put the ribbon through the end holes from the bottom and then the ribbon from the left side should be threaded down and up through the holes one-half inch apart. Then put both ends of the ribbon down through the second hole from the right to the signature sheet and pull both ends out between the signature sheet and the next sheet above and with the ribbon ends drawn up tight. Pull the loose ends out to the right between the sheets and place them under an adhesive seal at upper right-hand corner of the signature page and impress the seal while damp with heavy pressure with a seal press. Trim the loose ends of the ribbon.

Figure 3 (p. 435)

In the receipt illustrated in " A.", the signature fails to project beyond the edges of the stamp. It is not uncommon for such a stamp to be steamed off and used for fabricating a forged receipt which will thus bear a " genuine " signature:

See " B."

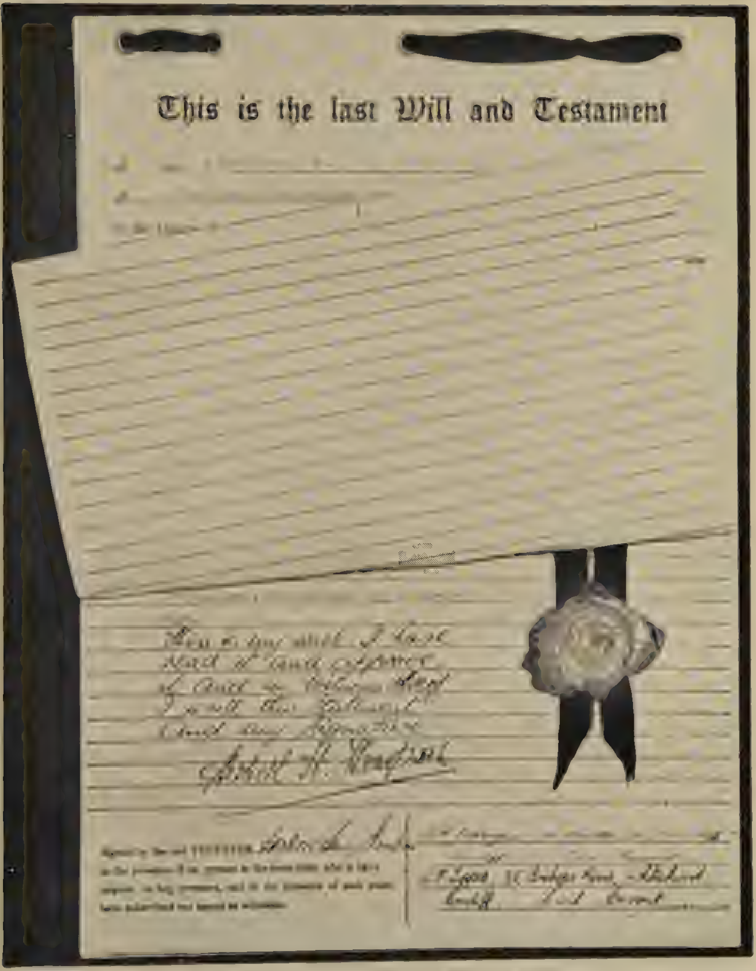
This trick does not always succeed for unless the forger is exceptionally skilled, traces of excess adhesive will be apparent in the neighbourhood of the perforation:

See " C."

A further pitfall for the forger is provided by the watermark on the stamp. Although the colour and design of this 2d. stamp have remained the same since its introduction on September 1, 1953, the watermark has been changed twice.

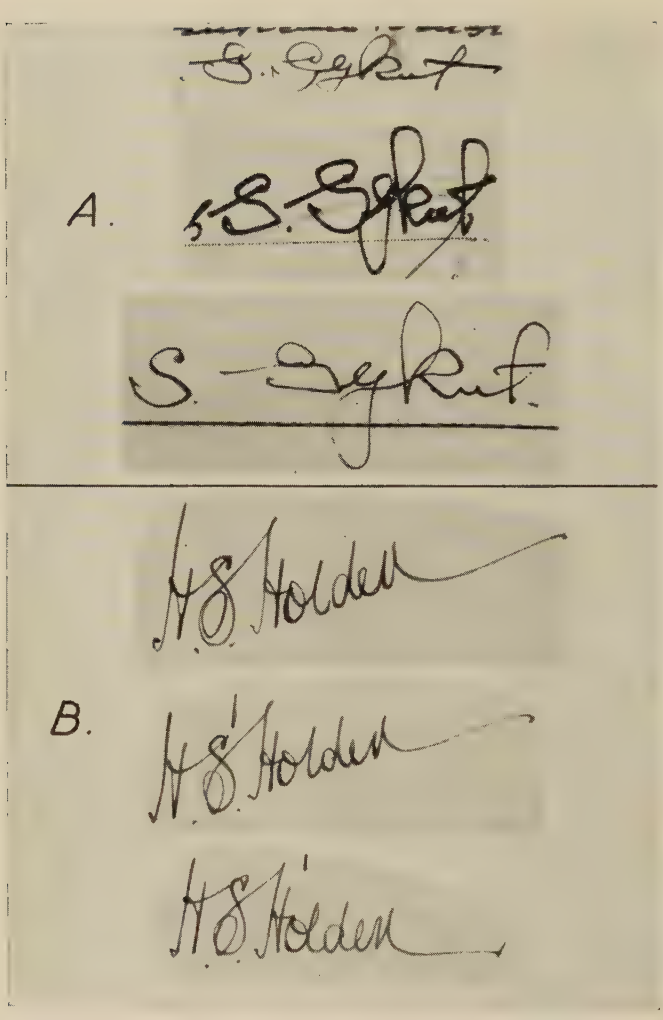
The first change, the substitution of the St. Edward's crown illustrated at " E." for that shown at " D.", took place on September 6, 1955. The second, the all-over use of the St. Edward's crown, was effected on April 12, 1958.

The watermark will often allow a limit of age to be given to a stamp. The stamp on receipt " A." included the St. Edward's crown in the watermark. This was fitting for this particular receipt but not for the forged receipt " B." which bears an earlier date.



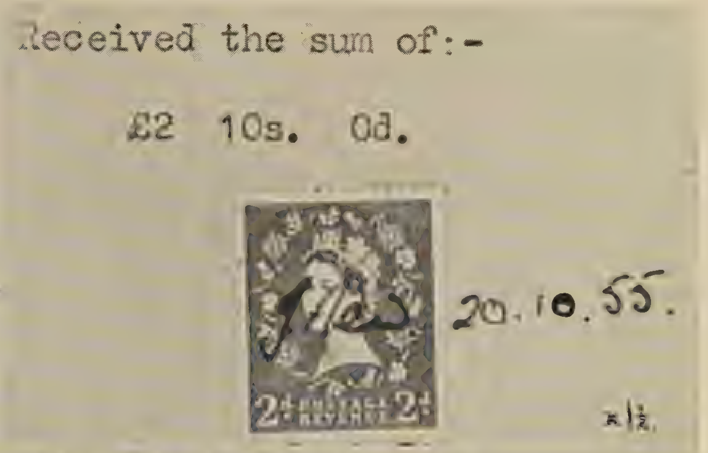
This is the last Will and Testament

This illustrates the method of binding together several separate sheets of paper in such a way that substitution would be rendered very difficult. The method is described in the appendix. Note also that the signature is accompanied by a few lines in the handwriting of the testator.



A. illustrates the three signatures of a man who was probably murdered because of the extreme variability found in examples of his genuine signature. His murderer, Onufrejczyk, thought that his forgery of Sykut's name on a number of documents would go undetected if Sykut were no longer alive to disclaim the forgeries. B. illustrates three examples of a signature it would prove extremely difficult to forge. The writing is rhythmic with excellent line quality and the signatures show little variation.

A.



Received the sum of:-

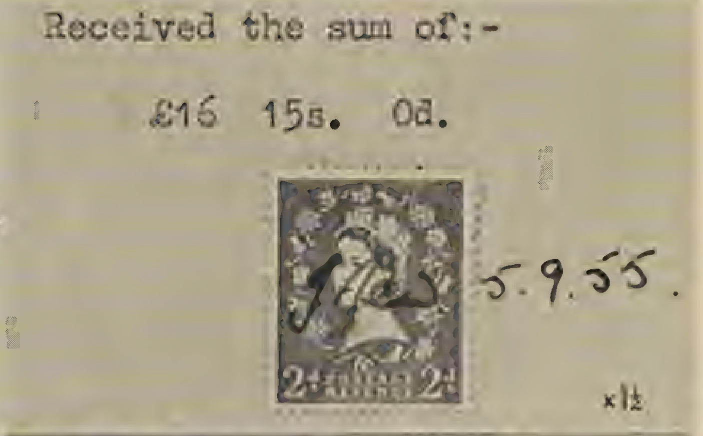
£2 10s. 0d.

20.10.55.

2½ POSTAGE REVENUE 2½

x1½

B.



Received the sum of:-

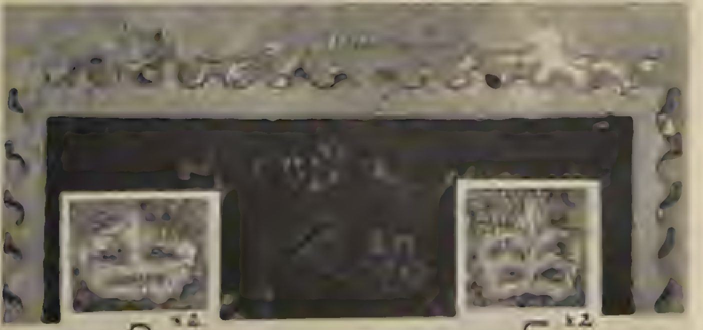
£16 15s. 0d.

5.9.55.

2½ POSTAGE REVENUE 2½

x1½

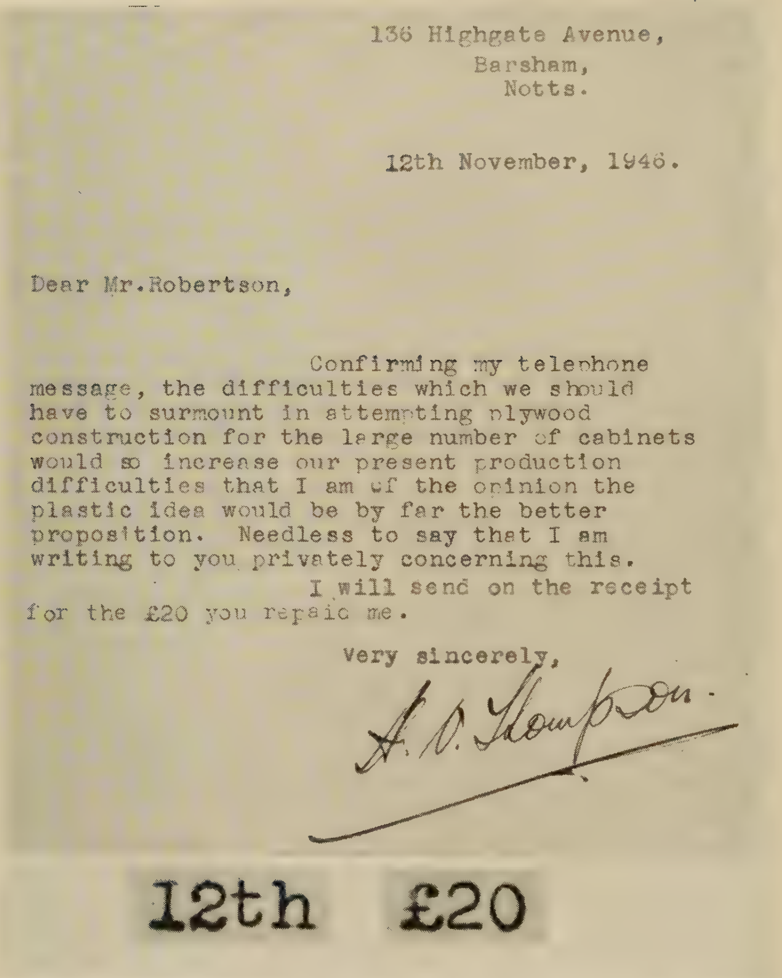
C.



x1½

D. x2

E. x2



136 Highgate Avenue,
Barsham,
Notts.

12th November, 1946.

Dear Mr. Robertson,

Confirming my telephone message, the difficulties which we should have to surmount in attempting plywood construction for the large number of cabinets would so increase our present production difficulties that I am of the opinion the plastic idea would be by far the better proposition. Needless to say that I am writing to you privately concerning this.

I will send on the receipt for the £20 you repaid me.

Very sincerely,

A. O. Thompson.

This illustration shows what may happen if gaps are left in typewritten documents. The reference to the receipt of £20 has been inserted into the gap left between the words "concerning this" and "Very sincerely". A different typewriter was used for the addition. This is clearly shown by the difference in design of the 2 of 20 and the 2 in the date.

Practice and Procedure

Sentence

The Lord Chief Justice said (Court of Criminal Appeal: April 13, 1959) that the court's attention had been drawn to a difficulty which sometimes arose when a sentence was expressed to begin " at the expiration of the term of imprisonment you are now serving," or words to the same effect. If, as sometimes happened, the prisoner was already subject to two or more consecutive terms of imprisonment, the effect of such a formula was that the new sentence would begin at the expiration of the term he was *then* serving, which might be the first of two consecutive terms. This would often not be the intention of the court giving the new sentence. It was suggested that the simplest course would be to use some such formula as " consecutive to the total period of imprisonment to which you are already subject." The only exception to the use of such a formula would be if the intention was that the new sentence should be concurrent with one of the previous sentences. It had been arranged that the prison governors would in appropriate cases add to the list of previous convictions supplied to the court a footnote indicating that the prisoner was already subject to consecutive sentences and giving details of them. [H. P.]

Case and Comment *

BREACH OF THE PEACE

Scots law—breach of the peace—circumstances in which mere words spoken in private sufficient to constitute.

Young v. Heatly

High Court of Justiciary: Lord Justice General (Clyde), Lords Carmont and Russell.[1]

Y. the Deputy Headmaster of a technical school was charged with four breaches of the peace arising out of four separate interviews, at each of which only Y. and one or other of three male students aged 16 and 17 years were present, when Y. was alleged to have made grossly improper remarks. After hearing evidence from each of the students concerned and from Y., whose denial was disbelieved, the police judge found Y. guilty on each charge and sentenced him to sixty days' imprisonment. On appeal it was argued that the complaint was irrelevant in that mere words could not amount to breach of the peace, and that what passed between teacher and pupil in private without any evidence that the pupil was upset or alarmed could not amount to the crime libelled: and that the sentence was harsh and oppressive.

Held, that although normally witnesses require to be produced who speak to being alarmed or annoyed, there may be cases so flagrant having regard to the nature of the conduct and the relationship of the parties as to entitle the court to draw the necessary inference from the conduct itself. The accused was properly convicted and the sentence amply warranted. [A. R. BROWNLIE, *Solicitor*.]

Commentary. In the case of *Ferguson* v. *Carnochan*, 2 White 278, it was laid down that " Breach of the peace consists in such acts as will reasonably produce alarm in the minds of the lieges—not necessarily alarm in the sense of personal fear, but such alarm as causes them to believe that what is being done causes, or will cause, real disturbance to the community, and the breaking up of the peace of the neighbourhood. Where there is brawling, and where offensive language is used, it is not necessary that those who hear it should be alarmed for their personal safety. It is enough if the conduct of those who are found brawling and using the offensive language is such as to excite reasonable apprehension that mischief may ensue to the persons who are misconducting themselves, or to others." In that case a publican who caused such a noise by shouting and brawling in his own premises in the early hours that he was heard on the public street by two constables was found guilty of breach of the peace. In *Matthews & Rodden* v. *Linton* (1860) 3 Irv. 570, a conviction resulted where two men fought in a private house but alarmed persons outside. *Galbraith*, 2 Irv. 520 and *Banks*, 3 Coup. 359, were to the effect that mere words could not amount to breach of the peace.

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* Reported, unless otherwise stated, by David Calcutt and Henry Palmer, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the appellant: *Jauncy* (instructed by Cochrane & Blair Paterson, S. S. C.). For the respondent: *Mackay* (instructed by Town Clerk, for City Prosecutor, Edinburgh).

The present case was brought upon the evidence of three youths who at separate times on the same day and in private had heard but apparently did not resent the remarks complained of. The rule of *Moorov* v. *H.M. Advocate*, 1930 J.C. 68 (and see [1958] Crim.L.R. 477) was applied to obtain mutual corroboration and the case of *Raffaelli* v. *Heatly*, 1949 J.C. 101, invoked as one in which no evidence of alarm was adduced. Yet in fact the report of that case (which was concerned with the activities of a " peeping Tom ") showed that at least one witness had been concerned for the effect the accused's action might have upon an invalid neighbour. The present decision seems to bring private communications between persons standing in a relationship of trust within the ambit of the criminal law.

CHILDREN

Offence by boy aged eight—rebuttal of presumption that child incapable of committing a crime—evidence of home background

F. v. Padwick

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Salmon JJ.: *The Times*, April 24, 1959.[2]

F., a boy aged eight, broke into a dwelling-house. He took a cash-box containing money, but ignored the other goods in the house. He removed the money from the box, throwing the box in a tank and spending the money. He was accused of " stealing " the box and the money, and admitted it. He was then arrested, charged and bailed. Six days later he entered a house and took some fruit.

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[2] For the appellant: *H. S. Ruttle* (instructed by Messrs. Jaques & Co. for Messrs. John Robinson & Jarvis, Newport, Isle of Wight). For the respondent: *J. H. Inskip* (instructed by Messrs. Bailey & Band, Newport, Isle of Wight).

The juvenile court recorded findings of guilt against F. on two charges, one of breaking and entering a dwelling-house and stealing therein the cash-box and the money, the other of stealing the fruit. F. appealed on the ground that there was no evidence before the justices to rebut the presumption that he was incapable of committing a crime.

Held, dismissing the appeal, that the facts stated above were evidence from which the justices were entitled to hold that the presumption was rebutted.

Per curiam: The justices recorded a finding of guilt in this case before they had heard evidence about F.'s home background and all his circumstances. This evidence is highly material to the question of whether a child knows that what he is doing is wrong, and should be admitted in spite of the risk that it will disclose information highly prejudicial to him. [D. C.]

EVIDENCE

Admissibility—confession—inducement

R. v. Sutherland and Johnstone

Court of Criminal Appeal: Lord Parker C.J., Donovan and Salmon JJ.: April 13, 1959: *The Times*, April 14, 1959.[3]

S. and J. were convicted at quarter sessions of shopbreaking and larceny. At the trial the only evidence against the two accused was that of alleged confessions. The defence was, in the case of S., that the confession was obtained as a result of an inducement, the evidence being that words were used by police officers to the effect that it would be better for his own and for his wife's sake if he made a statement. The chairman of quarter sessions, ruling on the admissibility of that statement, said that it would have been better if those words had not been used but that the statement was nevertheless admissible. In the case of J. the defence was that the alleged confession was pure concoction. S. and J. appealed to the Court of Criminal Appeal on the main ground of failure to warn the jury that the confession of one prisoner was no evidence against the other, and (in the case of S.) that the jury were not directed that they ought to reject the statement if they were not satisfied that it was made voluntarily.

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[3] For the appellants: *F. H. Potts* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *W. Temple* (instructed by Messrs. Swinburn G. Wilson & Son, Newcastle upon Tyne).

Held, allowing both appeals, that on the question of admissibility of S.'s statement this court agreed that it would have been better if the police officers had not used the words in question; but even if the chairman were satisfied that the statement was nevertheless to be admitted to the jury, it was clearly for him to direct the jury that if they were not satisfied that the statement was free and voluntary they should reject it *in toto*. Moreover the chairman failed to warn the jury that J.'s statement was no evidence against S. and that S.'s statement was no evidence against J. In all the circumstances it would be unsafe to allow the convictions to stand. [H. P.]

Commentary. Words telling a prisoner that it would be "better" for him to confess amount, prima facie at least, to an improper threat or promise which will exclude any confession made in consequence of them: *R.* v. *Jarvis* (1867) L.R.I.C.C.R. 96, 99.

It is for the judge to say whether a confession should be admitted in evidence at all; but, when it is so admitted, it is for the jury to say what weight should be attached to it. Thus, where evidence has been heard in the absence of the jury as to the admissibility of a confession, defending counsel has the right to cross-examine again, in the presence of the jury, those witnesses who have given evidence in their absence; "for if he can induce the jury to think that the confession was obtained through some threat or promise, its value will be enormously weakened": *R.* v. *Murray* [1951] 1 K.B. 391, 393, *per* Lord Goddard C.J.

Admissibility—confession—inducement or threat

R. v. Smith

Courts-Martial Appeal Court: Lord Parker C.J., Streatfeild and Hinchcliffe JJ.: March 25, 1959: *The Times*, March 26, 1959.[4]

S. was convicted by General Court-Martial of murder. The deceased man was stabbed in the course of a fight between men of different regiments and subsequently died from his wounds. Immediately after the fight the regimental sergeant-major of one of the regiments, having heard of the incident, paraded the men and told them that he would keep them on parade until someone owned up. Eventually S. stepped forward and said: "I did the stabbing." Next morning S. was interviewed by a sergeant of the special investigation branch to whom he repeated his admission.

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[4] For the appellant: *Roderic Bowen* Q.C., *H. K. Woolf* (instructed by the Registrar, Courts-Martial Appeal Court). For the Crown: *E. Garth Moore* (instructed by the Director, Army Legal Services).

The deceased man received medical attention after the incident, *inter alia*, by artificial respiration. There was evidence that had he been given immediate and different treatment he might not have died.

Held, dismissing the appeal, (1) that although the action taken by the regimental sergeant-major was perfectly proper, nevertheless the evidence of what took place was clearly inadmissible at the trial. The courts had been at pains to hold that even the most gentle threats or slightest inducements rendered statements inadmissible on the ground that such statements were not made voluntarily. There was here clearly a threat which rendered S.'s first admission inadmissible. But, so far as S.'s admission to the sergeant of the special investigation branch was concerned, the principle to be deduced from the case was this: that if the threat or promise under which the first statement was made still persisted when the second statement was made, then it was inadmissible. Only if the time limit between the two statements, the circumstances existing at the time and the caution were such that it could be said that the original threat or inducement had been dissipated could the second statement be admitted as a voluntary statement. In the present case the effect of the original threat had been spent and the evidence was, therefore, clearly admissible.

(2) On the question of causation, the judge-advocate left to the court the question whether they were satisfied that the wound had caused the death. There was here evidence on which the court could so find, although it was now known that the medical treatment had been inappropriate. The case of *R.* v. *Jordan* (1956) 40 Cr.App.R. 152, was a very particular case depending upon its exact facts where, in the opinion of experts, death had not been caused by the stabbing but by certain injections; and the conviction was quashed on the ground that no reasonable jury properly directed could have concluded that there was not a break in the chain of causation. In the present case no reasonable jury or court could come to any conclusion other than that the death resulted from the original wound. Accordingly the appeal would be dismissed.

[H. P.]

Commentary. The rule concerning confessions is stated by Kenny (*Outlines of Criminal Law* (16th ed.), 492) as follows: "A confession must be excluded if it was made (i) in consequence of (ii) any inducement (iii) that was of a temporal character and (iv) connected with this accusation and (v) that was held out to the accused by a person who had some authority over the accusation." All these conditions were fulfilled in the present case except (iv). According to Kenny, " If the inducement had no bearing upon the legal proceedings connected with the accusation it will not exclude the confession. Thus a confession was admitted in spite of its having been obtained by the promise, ' If you will tell where the property is you shall see your wife ' [*R.* v. *Lloyd* (1834) 6 C. & P. 393]." A threat to keep the men on parade would hardly seem to be an inducement " bearing upon the legal proceedings connected with the accusation " within the meaning of this rule. It was a threat of unpleasantness to be inflicted if the criminal did not confess just as the words used in *R.* v. *Lloyd* were a promise of pleasantness if he did.

It is submitted, however, that condition (iv) of Kenny's rule does not accord with the principle underlying the confession rule, which is traditionally stated to be that confessions made in breach of the rule are involuntary and unreliable: *R.* v. *Warickshall* (1783) 1 Leach 263. It is not apparent why an inducement connected with the charge or accusation should be the only sort of inducement to have this effect and it is submitted with respect that the present case is authority against this view. *Cf.* However, *R.* v. *Joyce* (1957) 42 Cr.App.R. 19, [1958] Crim.C. & C. 35, where Slade J. admitted a confession precisely because condition (iv) of Kenny's rule was unfulfilled.

In *R.* v. *Jordan* (1956) 40 Cr.App.R. 152, the Court of Criminal Appeal, after hearing evidence of two medical experts to the effect that the medical treatment given to the victim of a stab wound was " not normal," quashed a conviction for murder on the ground that, if the jury had had the expert evidence before them, they might have found that death was caused by the medical treatment and not by the stab wound inflicted by the accused. The case is criticised by F. E. Camps and J. D. J. Havard in [1957] Crim.L.R. 576 (" Causation in Homicide—A Medical View ") where it is pointed out that the case gave rise to some concern in the medical profession. The authors predicted that " it is clear that if the victim of a homicidal assault dies as a direct result of medical treatment instituted to save his life, it will not in future be considered homicide if the treatment can be shown to be ' not normal '." The present case may relieve some of the concern of the medical profession for it affirms what was stated by the court in *Jordan's* case itself—that it was " a very particular case depending upon its exact facts." This formula may well be interpreted as a pronouncement that the case should never be followed: *cf.* Glanville Williams, *Learning the Law* (6th ed.), 75.

Certainly, the treatment given to the unfortunate deceased in the present case seems to have been abnormal; and the court held that even on the assumption that " the treatment given turns out in the light of subsequent knowledge to have been inappropriate and, indeed, harmful," still, " no reasonable jury or court could, properly directed, in our view possibly come to any other conclusion than that death resulted from the original wound." Comparing the facts of the two cases, it is certainly not easy to reconcile this finding with that in *Jordan's* case to the effect that " whatever direction had been given to the jury and however correct it had been the jury [if they had had the medical evidence before them] would have felt precluded from saying that they were satisfied that death was caused by the stab wound." The cases are, however, distinguishable in that, in the present case, the jury, with all the facts before them, were directed to consider the broad question whether the wound caused the death; whereas in *Jordan* "It did not occur to the prosecution, the defence, the judge or the jury that there could be any doubt but that the stab caused death."

Admissibility—offence committed by police officers in obtaining evidence

Marsh v. Johnston

High Court of Justiciary: 1959 S.L.T. (Notes of Recent Decisions) 28.[5]

The complainer was charged with selling intoxicating liquor outside permitted hours, contrary to section 4 of the Licensing Act, 1921. Evidence was given by two policemen who went to the complainer's hotel in plain clothes, and there saw two customers being supplied with what appeared to be intoxicating liquor after closing time. The policemen then bought liquor for themselves from the complainer, and when they had confirmed that it was excisable, he was cautioned. The justices convicted the complainer, who then presented a bill of suspension to the High Court of Justiciary, complaining that since the two policemen had themselves committed an offence in ordering a drink outside permitted hours, their evidence was vitiated.

Held, refusing the appeal, that in Scotland the true criterion for the admissibility of police evidence is fairness to the accused. The mere fact that the policemen might have been guilty of a technical offence did not affect the matter, but it would have been otherwise if the police had pressed the complainer to commit the offence or had tricked him into doing so. As it was, there was nothing in the conduct of the police which was in the least improper, and nothing which made their evidence incompetent. If evidence of this sort were to be automatically excluded, there would be a wholesale flouting of the law. [D. C.]

Commentary. *Cf. Brannan* v. *Peek* [1948] 1 K.B. 68 in which Lord Goddard C.J. said:—

"It cannot be too strongly emphasised that, unless an Act of Parliament provides for such a course of conduct—and I do not think any Act of Parliament does so provide—it is wholly wrong for a police officer or any other person to be sent to commit an offence in order that an offence by another person may be detected. It is not right that police authorities should instruct, allow or permit detective officers or plain clothes constables to commit an offence, so that they can prove that another person has committed an offence."

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[5] For the complainer: *R. H. McDonald, Q.C.*, and *Cameron* (instructed by Messrs. Scott & Glover for Messrs. J. & J. M. Little, Dalbeattie). For the respondent: *Macvicar* (instructed by Messrs. Balfour & Manson).

The Royal Commission on Police Powers and Procedure (Cmd. 3297, (1928) p. 116) recommended:—

"As a general rule the police should observe only, without participating in an offence, except in cases where an offence is habitually committed in circumstances in which observation by a third party is *ex hypothesi* impossible. Where participation is essential it should only be resorted to on the express and written authority of the Chief Constable."

As an illustration of the kind of case where participation might be permissible, the Commission put the case where "a certain person is acting as a fortune teller and thereby obtaining money from ignorant girls by prophecies of the kind which might be expected to be well received" (para. 109).

It is clear that in English law evidence obtained by participation in an offence is admissible. Thus, though the conviction in *Brannan* v. *Peek* was quashed on other grounds, there was no suggestion that the evidence obtained in the manner condemned by the court was inadmissible. Moreover, a person who participates in an offence simply for the purpose of obtaining evidence is not an accomplice for the purpose of the rule requiring corroboration: *R.* v. *Bickley* (1909) 73 J.P. 239.

Admissibility—questioning about offences other than those with which prisoner is charged

R. v. Powell-Mantle

Bedfordshire Quarter Sessions. Chairman, J. G. S. Hobson, Q.C., and Jury.[6]

The accused was indicted on 13 counts of false pretences, forgery, uttering a forged document and fraudulent conversion, all of which arose out of his alleged conduct whilst employed as the surveyor and engineer in charge of a large sewage-construction contract in Bedfordshire. The first six counts on the indictment were of a similar nature, and alleged that the defendant had obtained money from his employers by false pretences in that he had sent one of the labourers engaged on the sewage site to do work in the defendant's private garden, and drawn the labourer's wages from the employers by pretending that the labourer was, as he ought to have been, engaged on his ordinary work on the contract. The accused pleaded guilty to these six counts but strenuously denied the remaining generally more serious charges.

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[6] For the prosecution: *Niall MacDermott* (instructed by Griffen, Couch and Archer, Luton). For the defendant: *F. Maurice Drake* (instructed by Neve, Son & Co., Dunstable).

The defendant was arrested at his home on the South Coast on charges relating to the six counts to which he later pleaded guilty. He immediately admitted these six offences which at that time were the only charges made against him.

He was taken by the police to Dunstable, Bedfordshire, where he was questioned at some length about a number of different matters quite unconnected with the six offences for which he had been arrested save that these other matters all arose out of his conduct whilst in charge of the sewage contract. These other matters later formed the substance of the remaining seven counts in the indictment.

At the trial at quarter sessions counsel for the defence objected that the evidence of the police officers as to the questions and answers put to and received from the accused whilst he was in custody in respect of the offences forming the subject-matter of the first six counts was inadmissible in that the Judges' Rules had been contravened. Rule 3 of the Judges' Rules reads " Persons in custody should not be questioned without the usual caution being first administered." Archbold (§ 1119) observes that " Rule 3 is not intended to encourage or authorise the questioning or cross-examination of a person in custody, after he has been cautioned, on the subject of the crime for which he is in custody . . .".

It was pointed out for the prosecution that in this case the accused had been questioned only about matters *later* the subject of charges for which he was *not* then in custody.

The Chairman *held*, that although it was true that the accused was not at that time in custody for the matters about which he was questioned, these matters were closely linked with the charges for which he was then under arrest in that *all* the matters arose out of the employment of the accused as surveyor in charge of the sewage contract. In the circumstances the evidence of the police officers ought not to be allowed; and it was therefore excluded.

The accused was later acquitted on all of the remaining counts which were proceeded with. [F. MAURICE DRAKE, *Barrister-at-Law*.]

Commentary. The courts have repeatedly emphasised that the Judges' Rules do not have the force of law. They are merely administrative directions, the observance of which the police should enforce upon their subordinates as tending to the fair administration of justice. The fact that a statement is made by a person in custody in answer to a question put to him by a policeman in breach of the Rules is not in itself sufficient to make the statement inadmissible in law, even though no caution is given. Such circumstances, however, may be, and often are, grounds for the judge, in the exercise of his discretion, to exclude the statement. The practice of arresting a man on a minor charge and holding him in custody, while a case against him in connection with a major charge is being worked up, was considered by the Royal Commission on Police Powers and Procedure (1928). The practice was, at that time, recognised by the Metropolitan Police who regarded themselves as free to question the man on the major crime, after his arrest on the minor charge under Rules 1 and 3 of Judges' Rules.

Rules 2 and 3 seem, on the face of them, to imply that a person who is in custody may be questioned after he has been cautioned, and it appeared in the evidence before the Commission that some Chief Constables, relying on the Rules, allowed questioning of prisoners after caution. Others adhered to the stricter view, found in many judicial dicta, to the effect that the police have no right to question a person in custody, and permitted no questioning whatever after the constable had decided to arrest. The Commission quoted Wigmore's view that the right to question gives rise to the impression of the right to expect an answer and a right to an answer seems to create "a right to the expected answer—that is to a confession of guilt." "The simple and peaceful process of questioning breeds a readiness to resort to bullying and to physical force and torture." They reached the conclusion that "It is desirable to avoid any questioning at all of persons actually in custody."

Presumably in consequence of the Royal Commission's Report (Cmd. 3297), the Home Secretary issued a circular (No. 536053/23 of June 24, 1930), based on the advice of the judges, which was intended to remove any difficulties or divergences of opinion that may have existed in the past. This circular contains the statement quoted from Archbold in the report of the present case, which makes it clear that persons in custody should not be questioned on the subject of the crime for which they are in custody. While the circular makes no express reference to questioning on the subject of other crimes, it is submitted that it is clear that this omission was not intended to authorise such questioning. Certainly this was not the intention of the Royal Commission, for their recommendation xlvii reads:—

"A rigid instruction should be issued to the Police that no questioning of a prisoner, or a 'person in custody,' about *any* crime or offence with which he is, *or may be*, charged should be permitted." [*My italics.*]

Indeed, it would appear that questioning of a prisoner about a crime for which he is not in custody receives a more severe condemnation than does questioning him about the charge on which he has been arrested. Notwithstanding that the Director of Public Prosecutions described that practice of arresting on a minor charge, pending inquiries into a major crime, as, "from the point of view of the public . . . a first-rate procedure," the Commission said (Report, para. 159):

"We think that any deliberate recourse to this practice, which contains elements of subterfuge, is on principle to be deprecated. There is a special risk of unfairness when the minor charge on which the man is arrested is itself of an undefined character, such as 'loitering with intent to commit a felony.'"

Of course the opinions of a Royal Commission, far from having the force of law, do not even possess that degree of authority as "administrative directions" which belongs to the Judges' Rules, but they are referred to here as an indication of the probable intention of the Home Office Circular of June, 1930. Only one decision on the point has been found. In *R.* v. *Booker* (1924) 18 Cr.App.R. 47 the Court of Criminal Appeal admitted in evidence on a trial for murder a statement made by the accused, in answer to questions put to him by a policeman, when he was in custody on a charge for a lesser offence. The court held that nothing had been done contrary to the Judges' Rules; but the decision seems to be based on the now repudiated view that questioning of persons in custody is permissible once a caution has been given. The case is therefore of doubtful authority on the point raised in the present case.

It is submitted that the better view is that the Rules permit no questioning of a person in custody, whether with reference to the crime for which he is in custody or for any other crime. The objections which have led to the exclusion of questioning about the crime for which the prisoner is under arrest apply with at least equal force to questioning about any other crime.

Attempt to procure acts of gross indecency—corroboration

R. v. Gammon

Court of Criminal Appeal: Lord Parker C.J., Donovan and Salmon JJ.: April 20, 1959: *The Times*, April 21, 1959.[7]

G. was convicted at quarter sessions of attempting to procure acts of gross indecency with seven boys aged fourteen to seventeen. The facts were that G., who was a baker's roundsman, whilst driving his van, stopped a number of boys and invited them into the van to perform acts of gross indecency with him. On the question of corroboration the deputy chairman directed the jury as follows: "I will tell you now something which is in his favour in the sense that it is a matter which, in a case of this kind, you will bear in mind; it is a danger always present where youths of this age group—fourteen to seventeen—are giving evidence of alleged sexual offences against a grown man that they may be affected consciously or unconsciously by the period of life when they are coming to puberty and imagine all sorts of things which never happen and give evidence which sometimes (though they do not realise it) is in fact completely untrue. It applies more to girls than boys . . . It applies to some extent . . . Nevertheless, I think it right to give you a general but vague warning that you are dealing with the evidence of boys of what I might describe as a sexual age, and there is no independent evidence from some other source that the evidence of any particular boy is true. Having given you that warning, I do not want you to exaggerate it in the least. I do not want you to take it as expressing my view that it would not be safe to convict or anything of the kind." On appeal to the Court of Criminal Appeal:—

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[7] For the appellant: *Malcolm Morris, Q.C.* (instructed by Messrs. Girling, Wilson & Harris, Herne Bay). For the Crown: *A. P. Babington* (instructed by the Director of Public Prosecutions).

Held, allowing the appeal, that (1) where, as in the present case, a man stopped his van and invited boys into the van for the clearly expressed purpose of gross indecency, that was in the opinion of the court an invitation which constituted an attempt. The principle to be derived from the cases (*R.* v. *Cope*, 16 Cr.App.R. 77; *R.* v. *Woods*, 22 Cr.App.R. 41; and *R.* v. *Miskell* [1954] 1 All E.R. 137) was that an apparently innocent invitation, albeit accompanied by the intention on the part of the invitor to commit an immoral act, did not amount to an attempt, but such an intention accompanied by an invitation making it clear to the recipient what was intended would amount to an attempt.

(2) It was always the duty of the tribunal in cases of this nature to invite the jury to look for corroboration and to warn them that they should be careful not to convict in the absence of corroboration unless the evidence completely satisfied them of the guilt of the accused. In the present case, so far from giving the ordinary warning, the deputy chairman had minimised the danger involved and told the jury that it was only a trifling danger which they were entitled to disregard. In the circumstances a clear direction to the jury had been required and, accordingly, it would be unsafe to allow the conviction to stand. [H. P.]

Commentary. *Cf. R.* v. *Lawson* [1959] Crim.L.R. 134 and commentary thereon.

It is a well-established rule of practice that, in the case of all charges of sexual offences, the jury should be warned that it is unsafe to convict on the uncorroborated evidence of the victim: *R.* v. *Winfield* (1939) 27 Cr.App.R. 139.

Larceny—Scots law—goods recently stolen in possession of accused —silence of accused

See COLLINS AND ANOTHER *v.* H.M. ADVOCATE, p. 465, *post.*

Rape — consent — evidence that prosecutrix of notorious bad character

R. v. Greatbanks

Central Criminal Court: Elwes J. and a jury: April 24, 27 and 28, 1959.[8]

G. was indicted with rape. The defence was that the prosecutrix had consented to the act of sexual intercourse. The prosecutrix denied consent and the question arose whether witnesses could be called by the defence to show that the prosecutrix was a woman of notoriously bad character for want of chastity or common decency. Counsel for the defendant submitted that such evidence was admissible and cited Archbold, § 2885; Halsbury's *Laws of England* (3rd ed.), p. 448, para. 826; *R.* v. *Barker* (1829) 3 C. & P. 589; *R.* v. *Clarke* (1817) 2 Stark. 241; *R.* v. *Clay*, 5 Cox 146; *R.* v. *Tissington*, 1 Cox 84; and distinguished *R.* v. *Cargill* [1913] 2 K.B. 271. Counsel for the prosecution, submitting that the evidence was inadmissible, cited *R.* v. *Holmes* (1871) 1 L.R.C.C.R. 334 and *R.* v. *Riley* (1887) 18 Q.B.D. 481.

Held, that the evidence was admissible. In a case other than rape such evidence would clearly not be admissible. In rape cases, however, special rules applied. It was certain that evidence of intercourse with named men could not be admissible in a rape case but evidence showing that the woman was a prostitute or, as in this case, that she was a woman of loose character or notorious for want of chastity or indecency was, on the authorities, admissible. The defence would, therefore, be allowed to call such evidence. [The prisoner was acquitted.] [H. P.]

Commentary. See, in addition to the authorities cited by counsel for the defendant, Wigmore, *Evidence*, § 62, Cross, *Evidence*, 307, Nokes, *An Introduction to Evidence*, 138, and *Sexual Offences, a Report of the Cambridge Department of Criminal Science*, 384.

R. v. *Holmes*, relied on by the prosecution is authority for the very different point that evidence is not admissible to prove that the prosecutrix has had intercourse with a man other than the prisoner, when she has denied that fact in cross-examination. In that case Kelly C.B. expressly pointed out that evidence showing the prosecutrix to be a common prostitute " has long been held material." *R.* v. *Riley* establishes that evidence is admissible to show that the prosecutrix has had voluntary intercourse with the prisoner on other occasions, " because such evidence is in point as making it so much more likely that she consented on the occasion charged in the indictment."

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[8] For the prosecution: *S. A. Morton* and *Robert Harman* (instructed by the Director of Public Prosecutions). For the defendant: *Michael Coombe* (instructed by Alfred Slater & Co.).

The reason why evidence of acts of immorality with third persons is excluded is that "If such evidence . . . were admitted, the whole history of the prosecutrix's life might be gone into; if a charge might be made as to one man, it might be made as to fifty, and that without notice to the prosecutrix. It would not only involve a multitude of collateral issues, but an inquiry into matters as to which the prosecutrix might be wholly unprepared, and so work great injustice." Evidence as to general reputation is not thought to raise the same objection. *Cf.* the similar rule which prevails where the accused puts his character in issue: *R.* v. *Rowton* (1865) L. & C. 520; 169 E.R. 1497; *R.* v. *Butterwasser* [1948] 1 K.B. 4.

FOOD AND DRUGS

Section 8 of the Food and Drugs Act, 1955—no civil remedy

Buckley v. La Reserve

Westminster County Court: His Honour Judge Blagden: January 16, March 2, 1959.[9]

For the purpose of the trial on a preliminary point of law the facts were assumed to be as follows:

The plaintiff suffered very severe food poisoning in consequence of eating snails in the defendants' restaurant. No negligence was alleged against the defendants, nor could the plaintiff sue in contract since she was in no way in contractual relationship with the defendants; she was a guest for the meal of another person whom the defendants knew in advance was to pay for the meal.

The plaintiff sought to recover damages on the grounds that the defendants were in breach of their statutory duty under the provisions of section 8 of the Food and Drugs Act, 1955, in that they had in their possession for sale and had sold for human consumption food intended but unfit for human consumption. On a trial on the preliminary point of law *held* that the provisions of the Food and Drugs Act, 1955, including section 8, gave rise only to criminal and not to civil remedies.

His Honour Judge Blagden reached his decision on the following grounds:

(1) That in his opinion this Act was not passed for the benefit of any class of the community, but for the community as a whole.

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[9] For the plaintiff: *F. Maurice Drake* (instructed by Farrer & Co.). For the defendants: *P. Bennett* (instructed by Hewitt, Woollacott & Chown).

Consumers of sold food, who are protected by the Act, are so large a class as to be identifiable only with the whole community.

(2) He agreed that curious anomalies were created by his decision against the plaintiff. The right of relief might indeed depend on the toss of a coin; but this was because the *general rule* is that the loss should lie where it falls. The purchaser, protected by section 14 of the Sale of Goods Acts, is the fortunate person taken outside the general rule, and he is the exception not the unfortunate person like the plaintiff in the present case.

(3) It was quite correct that the present trend of the law in this country was away from liability without fault. This was an effective answer to any American decisions.

(4) Although the result appeared odd it would be equally odd if a thief who stole and ate adulterated food had a civil remedy against the person from whom he stole it.

[F. MAURICE DRAKE, *Barrister-at-Law*.]

Commentary. A person injured by bad food may have either or both of two remedies against the supplier at common law; (1) If he has received the food under a contract which he has made with the supplier he may sue him for breach of an implied undertaking (see Sale of Goods Act, section 14) that the food is fit for human consumption; or (2) whether he has or has not a contract with the supplier he may sue him in negligence.

In *Lockett* v. *Charles* [1938] 4 All E.R. 170 Tucker J. held that where two persons (in that case husband and wife) go into a restaurant together and order food, each of them is making himself liable to pay for the food which he orders, whatever may be the arrangement between them as to who is to pay for the meals; and accordingly, that the wife could sue in contract, notwithstanding the fact that the bill was paid by the husband. In the present case it was presumably clear from the start that the plaintiff was a guest and was not making herself liable to pay. Negligence could be established only if it could be proved that the defendants knew, or ought to have known of the harmful quality of the snails and presumably there was no evidence of this.

It is well-established that, for a criminal conviction under section 8 of the Food and Drugs Act, neither *mens rea* nor negligence need be proved. It is an offence of " absolute prohibition " and there is little doubt that the defendants in the present case were liable to such a conviction—though they might have escaped liability under section 113 of the Act by proving (a) that the contravention was due to the act or default of a third person (*e.g.*, the person from whom they bought the snails) and (b) that the defendants themselves had used all due diligence to comply with the requirements of the Act.

There are many statutes which impose criminal liability in express terms but say nothing whatever of any civil remedy where the courts have held that an action in tort will lie for breach of the statutory duty. For example, in *Monk* v. *Warbey* [1935] 1 K.B. 75 it was held that the owner of a car who, in contravention of section 35 (1) of the

Road Traffic Act, 1930, permits his car to be used by one who is not insured against third-party risks, is liable in damages to a third party who has been injured by the negligent driving of the uninsured person. On the other hand, breach of the duty imposed by section 1 of the Road Transport Lighting Act, 1927, to carry a red rear light on a vehicle during the hours of darkness, does not, in itself, afford a cause of action to a person who has suffered damage as a result of the breach: *Clarke and Wife* v. *Brims* [1947] 1 K.B. 497. The fundamental question in the case of each statute is whether Parliament intended to create a cause of action in tort, and, in answering that question, the courts may take many matters into consideration: See Street on *Torts*, 289 *et. seq.* Thus the fact that the Act was passed for the protection of the public as a whole and not for the benefit of a particular class (*cf.* Judge Blagden's first holding), while a matter which may properly be taken into consideration, is by no means conclusive: *Phillips* v. *Britannia Hygienic Laundry Co.* [1923] 2 K.B. 832, 841, per Atkin L.J.—" It would be strange if a less important duty, which is owed to a section of the public, may be enforced by an action, while a more important duty owed to the public at large cannot."

HOMICIDE

Murder—causation—medical treatment after wounding

See R. *v.* SMITH, p. 441, *ante*.

Murder—provocation—attempt to commit sodomy

McCluskey v. H.M. Advocate

High Court of Justiciary: 1959 S.L.T. (Notes of Recent Decisions) 26.[10]

M. (a male person) was charged with murder by beating his victim with his fists, kicking him and stamping upon him. M. stated in evidence that the deceased made an indecent suggestion to him and then gripped him round the waist and pushed him towards a bed. The judge refused to direct the jury that if the injuries were inflicted in the course of resisting an attempt to commit sodomy the homicide would be justified, and M. was convicted of culpable homicide. He appealed.

Held, refusing the appeal, that to justify a plea of self-defence, it was essential that the attack causing the death should be made to save the accused's life.

Per The Lord Justice-General (Clyde): I do not see how the taking of a human life can ever be justified by the mere fact that there have been threats of dishonour or indignities or even of some bodily harm, which falls short of creating reasonable apprehension of danger to life. [D. C.]

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[10] For the appellant: *Maxwell, Q.C.,* and *Hammett* (instructed by Mr. Thomas B. Wright for Mr. A. Warwick, Glasgow). For the respondent: *Brand, A.-D.* (instructed by Mr. Lionel A. Gordon, Crown Agent).

Commentary. According to Foster, *Crown Law*, 273, " In the case of justifiable self-defence the injured party may repel force by force in defence of his person, habitation, or property against one who manifestly intendeth and endeavoureth by violence or surprise to commit a known felony upon either. In these cases he is not obliged to retreat but may pursue his adversary till he findeth himself out of danger, and if in a conflict between them he happeneth to kill, such killing is justifiable." This rule must now be read subject to the qualification that the force used must be no more than the minimum necessary to prevent the commission of the felony and must not be disproportionate to the injury which it is intended to prevent. See " Report of the Royal Commission on the Law Relating to Indictable Offences " (1879) C. 2345, p. 44n., and Stephen, *Digest of the Criminal Law*, Art. 304.

As, in English law, the burden of proof, where self-defence is raised, is on the prosecution, *Chan Kau* v. *R.* [1955] A.C. 206; *R.* v. *Lobell* [1957] 1 Q.B. 547 it is thought that a direction to the jury would have been necessary, though the result might well have been the same.

LARCENY

Evidence—Scots law—goods recently stolen in possession of accused—silence of accused

See COLLINS AND ANOTHER *v.* H.M. ADVOCATE, p. 465, *post.*

LICENSING LAWS

Aiding and abetting consumption of intoxicating liquor outside permitted hours—standard of proof

Duxley v. Gilmore

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Salmon JJ.: *The Times*, April 23, 1959.[11]

G., the licensee of a hotel, was charged with aiding and abetting specified persons to consume intoxicating liquor in licensed premises during other than permitted hours, contrary to section 100 of the Licensing Act, 1953. The justices found that about twenty minutes after closing time there was a considerable amount of drinking going on by persons who were sitting down, apparently at their ease. It was conceded by the prosecutor that efforts had been made to get these persons to leave. The justices accepted a submission for the defence that there was no case to answer, and dismissed the information. The prosecutor appealed.

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[11] For the appellant: *J. M. Davies* (instructed by Messrs. Arthur Taylor for Messrs. Mace & Jones, Liverpool). For the respondent: *Andrew Rankin* (instructed by Messrs. Knowles & Warburton, Widnes).

Held, allowing the appeal, that the facts at once prompted the question whether the licensee could have been unaware of what was going on. If he was aware of the facts, the further question arose whether his conduct showed active encouragement, or passive tolerance so marked that it amounted to the same thing. It could not be said that a reasonable person could not conclude from the evidence that G. was guilty of aiding and abetting, and the case would be remitted to the justices with a direction that a prima facie case had been made out by the prosecution. [D. C.]

Commentary. It is not a substantive offence for a licensee to permit drinking on the licensed premises out of hours. He can therefore be convicted, if at all, only of aiding and abetting the offence committed by the customer. *Ferguson* v. *Weaving* [1951] 1 K.B. 814; *Thomas* v. *Lindop* [1950] 1 All E.R. 966. Some positive act of encouragement or assistance is usually required for aiding and abetting but, where there is a duty to act, mere inactivity may be enough: *du Cros* v. *Lambourne* [1907] 1 K.B. 40.

Market day exemption—meaning of "market" and "market place"

R. v. Bungay Justices, ex p. Long

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Salmon JJ.: *The Times*, April 16, 1959.[12]

B. applied to the Bungay justices for a general order of exemption for his licensed premises, under section 106 of the Licensing Act, 1953, which provides that such an order may be granted where the justices are of opinion that it is desirable to do so for the accommodation of any considerable number of persons attending a public market in the neighbourhood of the premises. Markets ceased to be held in Bungay twenty-two years ago, and the police opposed B.'s application. The justices held that there was no market in the sense of stalls, but that there was a market in the sense that a great number of farmers met in Bungay each

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[12] For the applicant: *W. M. F. Hudson* (instructed by Messrs. Maude & Tunnicliffe for Mr. P. F. Rodwell, Halesworth). Neither the justices nor B. appeared or were represented.

Thursday. They granted the application. The police applied to the Divisional Court for an order of certiorari to bring up and quash the justices' order.

Held, quashing the justices' order, that a meeting of people in public-houses could not possibly constitute a market, and the bar of a public-house could not possibly constitute a market-place. The justices therefore had no jurisdiction to make a general exemption order. [D. C.]

OFFICIAL SECRETS

Official Secrets Act, 1920—construction of criminal act against subject—avoiding absurdity

R. v. Oakes

Court of Criminal Appeal: Lord Parker C.J., Streatfeild and Hinchcliffe JJ.: March 23, 1959.[13]

O. was charged at assizes, *inter alia*, with doing an act preparatory to communicating to another person for a purpose prejudicial to the safety or interests of the State documents calculated to be of use to an enemy by entering into an agreement with one W. whereby the said W. was to procure a purchaser for certain documents used in a prohibited place and in the possession of O. The offence was alleged to be contrary to section 7 of the Official Secrets Act, 1920. At the trial a submission to quash the indictment on the ground that the count referred to disclosed no offence known to the law was overruled. Section 7 of the Act of 1920 provides: "Any person who attempts to commit any offence under the principal Act or this Act, or solicits or incites or endeavours to persuade another person to commit an offence, or aids or abets and does any act preparatory to the commission of an offence under the principal Act or this Act, shall be guilty . . ." of an offence.

It was submitted to the Court of Criminal Appeal that the section contained a number of matters which would constitute an offence, all the alternatives being separated by the disjunctive "or" except the final matter following the word "abets"; and thus no offence of doing an act preparatory to the commission of an offence by itself was constituted under the section. The appellant argued that the section should be construed literally and relied upon *Magor & St. Mellons R. D. C.* v. *Newport Corporation* [1952] A.C. 189; *Att.-Gen.* v. *Sillem* (1863) 33 L.J.Ex. 92, at p. 110, and *Coe* v. *Lawrence* (1853) 22 L.J.Q.B., p. 140.

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[13] For the appellant: *Gerald Howard, Q.C.*, and *J. S. Abdela* (instructed by Potter, Crundwell & Bridge, Farnham). For the Crown: *R. Manningham-Buller, Q.C., A.-G., Harold Brown, Q.C.*, and *E. J. P. Cussen* (instructed by the Director of Public Prosecutions).

Held, dismissing the appeal, that where the literal reading of a penal statute produced an intelligible result, clearly there was no ground for reading in words or changing words; but here the literal construction produced an unintelligible result. In the first place it was doubtful which words of the section would be qualified by the words "and does any act preparatory to the commission of an offence." Secondly, the offence of aiding and abetting would, under the section, be limited to the case where an act preparatory to the commission of the offence had taken place. And thirdly, in using the words "any person who does any act preparatory to the commission of an offence" the legislature was considering the doer of an act preparatory to the commission *by him* of an offence; if those words were read as a qualification of aiding and abetting the result became absurd because the essence of aiding and abetting was the aiding and abetting of someone else to commit an offence. Everything that had been said by Rowlatt J. and McCardie J. in *Att.-Gen.* v. *Beauchamp* [1920] 1 K.B. 650 seemed to this court to apply fully in the circumstances of this case. Accordingly, this court would construe the section by reading the word "or" for "and" after "abets" and the appeal would be dismissed. [H. P.]

Commentary. "It is an accepted maxim that a statute should not be reduced to absurdity if reasonable interpretation can avoid that result": Allen, *Law in the Making,* 507. In the present case the construction of "and" in a conjunctive sense would, as the court points out, lead to an absurdity. Yet it would seem that the plain meaning of the statute did lead to that result, for the use of the disjunctive "or," on seven occasions in the section, would, other things being equal, have left little doubt that the word "and" was used conjunctively. Authority is not lacking for the view that, in such a case, the plain meaning must be followed: "If the words of an Act are clear, you must follow them even though they lead to a manifest absurdity. The court has nothing to do with the question whether the legislature has committed an absurdity": *R.* v. *Judge of the City of London Court* [1892] 1 Q.B. 273, 290, *per* Lord Esher M.R. With this attitude may be contrasted that consistently advocated by Lord Denning: "When there is a fair choice between a literal and a reasonable interpretation, we should always choose the reasonable interpretation": *Henry* v. *Taylor* [1954] 1 Q.B. 506, 513, *per* Denning L.J. This seems to have been the view taken by the court in the present case and it is respectfully submitted that it is to be preferred.

McKinnon L.J. has pointed out that in the Carriage of Goods by Sea Act, 1924, the courts, in order to avoid a nonsensical result, have, in effect, substituted the word "and" for "or." "The violence of this operation has, I think, been minimised by saying that in this place the word 'or' must be taken to mean 'and.' That is a cowardly evasion. In truth one word is substituted for another. For 'or' can never mean 'and'": *Sutherland Publishing Co.* v. *Caxton Publishing Co.* [1937] Ch. 174, 201. It is, perhaps, an even bolder course to carry out a similar operation on a criminal statute, but it is submitted that it is equally right in principle. There is no violation of the rule that penal statutes should be strictly construed, for that rule requires the court to adopt the interpretation favourable to the accused where it has to choose between two *reasonable* meanings. Here the literal meaning was unreasonable. Nor is the course adopted unprecedented in criminal law. The Divisional Court has, in effect substituted the word "and" for "or" in section 1 of the Larceny Act, 1916: *Billing* v. *Pill* [1954] 1 Q.B. 70—though it is submitted that the course adopted was unjustifiable in that case for the plain meaning was not unreasonable.

RAPE

Consent—evidence that prosecutrix of notoriously bad character

See R. *v.* GREATBANKS, p. 450, *ante.*

ROAD TRAFFIC

Charge of driving goods vehicle at excessive speed—conviction of driving vehicles adapted to carry more than seven passengers —conviction quashed—no decision on whether vehicle so adapted.

Hubble v. Pearson

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Salmon JJ.: *The Times,* April 24, 1959.[14]

H. was charged with driving a goods vehicle at a speed in excess of 30 m.p.h., contrary to section 10 of the Road Traffic Act, 1930. The justices convicted him of a different offence, namely driving a motor-vehicle adapted to carry more than seven passengers at a speed in excess of 30 m.p.h. H. appealed, and counsel for both H. and the respondent agreed that the conviction could not stand, since it was for an offence that had not been charged. Both counsel, however, invited the Divisional Court to decide the question whether the vehicle was adapted to carry more than seven passengers, stating that the point was of great interest to their clients.

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[14] For the appellant: *J H. Inskip* (instructed by Mr. J. B. Izod for Messrs. Landons, Brentwood). For the respondent: *Gerald Hines* (instructed by Mr. T. Hambrey Jones, Chelmsford).

Held, allowing the appeal upon the ground that the justices had convicted of an offence which was not charged, that the court would not deal with a point that was not raised by the appeal; any decision on such a point, although of some weight, would not be binding. [D. C.]

Commentary. A decision on the point not before the court could only have been an *obiter dictum* and of merely persuasive force as a precedent. The courts are generally reluctant to decide questions which are not directly raised before them.

Dangerous driving—excessive speed—adequate consideration to surrounding circumstances

Johnstone v. Hawkins

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Salmon JJ.: *The Times*, April 17, 1959.[15]

H. was charged with dangerous driving, contrary to section 11 of the Road Traffic Act, 1930, and driving without due care and attention, contrary to section 12 of the Act. The justices found that H., riding a motor-cycle along a main road, crossed a road junction at a speed estimated by H. to be between 85 and 90 m.p.h. The road joining the main road was controlled by a " Slow—Major Road Ahead " sign. At the time of the incident there was no other traffic about. When some 20 yards short of the junction H. would have had a clear view of the full width of both roads, and that view would have remained clear until H. had passed the full width of the junction. While travelling that 20 yards and the full width of the junction (a total distance of about 220 feet), H. would have been able to see about a quarter of a mile along the main road and about 350 yards along the minor road. The justices stated that they were very familiar with the road. It ran through woodland; there were no buildings adjacent to it; and the only side road was that already described. They dismissed both informations. The prosecutor appealed.

Held, remitting the case to the justices for further findings of fact, that so far as the main road was concerned it was clear that the justices took into account both actual and potential danger, as they were bound to do under section 11 of the Act. It was not so clear that they had done so as regarded the road junction. The court should know whether H.'s view down the side road began only when he had reached a point 20 yards from the junction, and if not, how far from the junction H. would be before he could see what traffic was approaching along this road. The court should also know what traffic was to be expected at the junction at that time of day.

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[15] For the appellant: *Andrew Edwards* (instructed by Messrs. Field, Roscoe & Co., for Mr. Guy H. Davis, Gloucester). The respondent did not appear and was not represented.

Per Donovan J.: To pass a junction with a main road at this speed is prima facie dangerous driving. [D. C.]

Commentary. Excessive speed alone may constitute dangerous driving though it will not necessarily do so: *Bracegirdle* v. *Oxley* [1947] 1 K.B. 349. All the surrounding circumstances must be taken into account in deciding whether there is a danger to the public.

Dangerous driving—notice of intended prosecution—specification of place where offence occurred

Young v. Day

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Salmon JJ.: *The Times*, April 16, 1959.[16]

D. was prosecuted for dangerous driving. The justices found that on July 15, 1958, the police sent a notice of intended prosecution to D., which stated that they were considering prosecuting him for dangerous driving, among other offences, " at 7.40 p.m. on July 6, 1958, at Hothfield to Bethersden Road. It is alleged that whilst motor-car No. MKJ 680 was being driven along the Hothfield to Bethersden Road in the direction of Hothfield the driver drove in such a manner that he narrowly avoided colliding with a motor-car which was stationary on the offside of the road." D. was not warned at the time of the alleged offence, nor was the summons issued within the 14 days after it. No accident had occurred, nor was D. stopped at the time of or after the alleged offence. The road described was a minor road about four miles long.

The justices held that the place where the offence was alleged to have occurred was not sufficiently specified in the notice of intended prosecution, and dismissed the information. The prosecutor appealed.

Held, dismissing the appeal, that section 21 of the Road Traffic Act, 1930, required that the notice of intended prosecution should specify the place where the offence was alleged to have been committed, and that that requirement must be complied with. The question of whether there had been compliance was one of degree, and therefore it was a question of fact for the justices, who with full local knowledge had decided that the place was not sufficiently specified. The court could not say that there were no facts on which they could come to this conclusion. [D. C.]

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[16] For the appellant: *Victor Durand, Q.C.*, and *T. K. Edie* (instructed by Messrs. Sharpe, Pritchard & Co., for Mr. J. K. Cooper, Maidstone). For the respondent: *Dudley Collard* (instructed by Messrs. Cripps, Harries, Hall & Co.).

Driving under the influence of drink and dangerous driving—disqualification for three months only—special circumstances.

Archer v. Woodard

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Salmon JJ.: April 17, 1959.[17]

W. pleaded guilty to driving a motor-vehicle while under the influence of drink and to dangerous driving contrary to section 15 of the Road Traffic Act, 1930. In regard to the first charge, the magistrates fined him and disqualified him from holding a licence for a period of only three months, on the ground that there were special reasons entitling them to impose a lesser disqualification than the 12 months specified in the section. They found that W., on a day in October, 1958, drove along Malden Road at about 10.50 p.m., went on to his wrong side, forcing the prosecutor, who was on a motor-cycle on to the grass verge and, when approaching a cross-road, narrowly missing two other cars. He smelled of drink and both the prosecutor and a doctor came to the conclusion that he was under the influence of drink to such an extent as to be incapable of having proper control of the car. The magistrates found further that on the day in question W. had done a hard day's work, had a light lunch and gone on straight from his work to an entertainment for old people. During the evening he had a glass of beer and a sandwich and a double whisky before he started to drive himself home. He arranged for some of the old people to be driven home by a hired car instead of driving them himself as he had originally intended. He felt quite all right until he reached Malden Road, where the lights troubled him.

The special reasons found by the magistrates were (a) that W.'s condition was attributable as much to fatigue and lack of food as to drink; (b) that the quantity of drink taken was small; (c) that his conduct throughout the evening showed that he had been acting in a proper and prudent manner and distinguished his case from more usual cases of driving after convivial indulgence; and (d) he was fit to drive when he started his homeward journey and the effect of the whisky only overcame him just before he reached the road where he lived. They decided that those were special reasons within the meaning of section 15 sufficient to justify the reduction of the disqualification. On appeal by the prosecutor—

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[17] For the prosecutor: *Brian Leary* (instructed by the Solicitor, Metropolitan Police). For the defendant: *Stephen Stewart* (instructed by Gregsons, Wimbledon).

Held, in relation to (a) and (b), that, although the manner in which a man became drunk might constitute a special reason, *e.g.*, where a man's drink had been doctored, this was the common case of a man working very hard, not taking much of a mid-day meal and then taking a glass of whisky. That was quite incapable of being a special reason, and as neither (c) nor (d) could be said to be a special reason within the terms of the Act the case would be remitted to the magistrates with a direction that the disqualification should be extended to 12 months. [MRS. E. M. WELLWOOD, *Barrister-at-Law*.]

Commentary. Section 15 provides that a person convicted of an offence under that section shall " unless the court for special reasons thinks fit to order otherwise," be disqualified for at least 12 months from holding or obtaining a licence. The question whether, on facts found by the court, it is open to the court to hold that special reasons exist is one of law: *Knowles* v. *Rennison* [1947] K.B. 488; *Duck* v. *Peacock* [1949] 1 All E.R. 318.

Failure to stop after accident—giving of particulars—whether both elements need be present

North v. Gerrish

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Salmon JJ.: *The Times*, April 16, 1959.[18]

G. was charged with failing to stop and give his name and address after an accident, contrary to section 22 of the Road Traffic Act, 1930. Section 22 (1) of the Act provides: " If in any case, owing to the presence of a motor-vehicle on a road, an accident occurs whereby damage or injury is caused to any person, vehicle or animal, the driver of the motor-vehicle shall stop and, if required so to do by any person having reasonable grounds for so requiring, give his name and address, and also the name and address of the owner and the identification marks of the vehicle."

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[18] For the appellant: *James Wellwood* (instructed by Messrs. Sharpe, Pritchard & Co., for Mr. A. P. M. Nixson, Oxford). The respondent did not appear and was not represented.

The justices found that G., having come into collision with another vehicle, drove on for over a mile before he was stopped. He was then asked for his name and address, and gave them. Upon these facts, the justices acquitted G., holding that to constitute an offence under section 22 there must be not only a failure to stop, but also a failure to give the required particulars. The prosecutor appealed.

Held, allowing the appeal, that the section created only one offence, and that if there was a failure to comply with either of the requirements of the section that offence was committed. The case would be remitted to the justices with a direction that the offence was proved. [D. C.]

Offences under section 12 of the Road Traffic Act, 1930—broken steering column—reasonable doubt.

Johnson v. Fowler

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Salmon JJ.: *The Times*, April 18, 1959.[19]

F. was charged with driving without due care and attention, and with driving without reasonable consideration for other persons using the road, contrary to section 12 (1) of the Road Traffic Act, 1930. The justices found that F. was driving his car along the street when it veered to the left, mounted the pavement and collided with a kiosk. The car was badly damaged, and after the accident the steering column was found to be broken. F. was rendered unconscious by the accident, of which he remembered nothing. The car was only two and a quarter years old, and was well maintained. F. had noticed no defects in it before the accident.

The justices dismissed both informations, holding that since the steering column was found to be broken immediately after the accident, and since there was no evidence as to whether it was broken before or at the time of the accident, the case had not been proved. The prosecutor appealed.

Held, allowing the appeal, that the matter raised by the justices should not have caused a reasonable doubt in their minds if they had directed themselves properly as to the burden of proof. At the most it was a fanciful doubt. The case would be remitted to the justices with a direction to convict. [D. C.]

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[19] For the appellant: *G. F. Leslie* (instructed by Messrs. Sharpe, Pritchard & Co. for Mr. John Heys, Town Clerk, Sheffield). The respondent did not appear and was not represented.

Commentary. "Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable,' the case is proved beyond reasonable doubt, but nothing short of that will suffice"—*per* Denning J. in *Miller* v. *Minister of Pensions* [1947] 2 All E.R. 372, 373.

Unlicensed hackney carriage—meaning of "plying for hire"

Cogley and Others v. Sherwood;
Howe and Others v. Kavanaugh

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Salmon JJ.: *The Times*, April 23, 1959.[20]

The appellants were charged that they were the owners and drivers respectively of two unlicensed hackney carriages which plied for hire without a licence, contrary to section 7 of the Metropolitan Public Carriages Act, 1869. The justices found that the appellants were the owners and drivers of certain chauffeur-driven cars. These cars were available for hire by members of the public at London Airport. The system adopted by the owners of the cars was that the cars stood at the airport, with no indication that they were for hire on or near them. Inside the airport buildings, the owners kept desks with extensive advertisements of the facilities available, where people arriving at the airport could order transport to their destinations in the cars. The justices convicted the appellants of the offence.

Held, allowing the appeal, that neither of the cars could be said to be "plying for hire." It was of the essence of plying for hire that the vehicle in question should be on view and that the owner or driver should expressly or impliedly invite the public to use it; here such of the cars as were on view appeared to the public to be ordinary private cars with chauffeurs, and there was no indication that they were for hire.

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[20] For the appellants: *Neil Lawson, Q.C.*, and *W. A. Macpherson* (instructed by Messrs. Coward, Chance & Co.). For the respondents: *James Borders* (instructed by Mr. Alexander Charles, Leytonstone). For the Minister of Transport and Civil Aviation: *J. R. Cumming-Bruce* (instructed by Treasury Solicitor).

Per Donovan J.: The term does connote some exhibition of the vehicle to potential hirers as a vehicle which may be hired.

[D. C.]

Commentary. The justices held that *Griffin* v. *Grey Coaches, Ltd.* (1929) 93 J.P. 61 was indistinguishable from the present case and obliged them to convict. In that case the Divisional Court appears clearly to have held that "it was immaterial that the vehicle was not exhibited" (Avory J.). The court in the present case thought the cases distinguishable but on what grounds does not appear.

SCOTS LAW

Breach of the peace—circumstances in which mere words spoken in private sufficient to constitute

See YOUNG *v.* HEATLY, p. 438, *ante.*

Larceny — evidence — goods recently stolen in possession of the accused—silence of accused

Collins and Another v. H.M. Advocate

High Court of Justiciary: 1959 S.L.T. (Notes of Recent Decisions) 27.[21]

The appellants were charged in the sheriff court with stealing a lorry and ten tons of scrap metal. In the course of his charge to the jury the sheriff-substitute said that there was evidence sufficient in law to establish that the goods had recently been stolen and had been found in the possession, or constructive possession, of the accused. With regard to the other criminative circumstances, beyond mere possession of the goods, which were required to raise a presumption of guilt, he directed the jury that they would be entitled to accept as incriminating evidence the fact that one accused when cautioned and charged remained silent, while the other said, "I am saying nothing, not one iota," and that both had declined to explain their possession of the goods in the witness-box. Both the appellants were convicted.

Held, allowing the appeals, that the fact that a person when charged with a crime said nothing or said that he had nothing to say was not a criminative circumstance; *a fortiori*, his failure to give evidence at the trial was not such a circumstance.

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[21] For the first appellant: *I. Macdonald* (instructed by Messrs. Shiels & Macintosh). For the second appellant: *Anderson, Q.C.*, and *King Murray* (instructed by Messrs. Gray, Muirhead & Carmichael). For the respondent: *Wylie, A.-D.* (instructed by Mr. Lionel I. Gordon, Crown Agent).

Per the Lord Justice-General (Clyde): It may well be that a failure by the occupier of premises to give an explanation or to say anything when challenged by the police at an early stage in an investigation into the finding of recently stolen property on his premises may constitute a criminative circumstance. Quite different considerations apply when a person has been charged and cautioned. He is entitled to reserve his defence and is usually wise to do so.

[D. C.]

Commentary. For the English rule governing similar circumstances, see *R.* v. *Leckey* [1944] 1 K.B. 80 and *R.* v. *Gerard* [1948] 1 All E.R. 205.

SHOPS

Street trader—barrow—whether a "place where any trade or business is carried on"

Kahn v. Newberry

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Salmon JJ.: *The Times*, April 15, 1959.[22]

K. was charged with trading in contravention of section 12 of the Shops Act, 1950. Section 12 provides: "It shall not be lawful . . . to carry on in any place not being a shop retail trade or business of any class at any time when it would be unlawful . . . to keep a shop open. . . ." The magistrate convicted K., who appealed to quarter sessions. The appeals committee, dismissing the appeal, found that between 10.20 p.m. and 10.25 p.m. one evening K. stood beside a stationary costermonger's barrow in the street, and during this time sold apples to two different customers. By section 2 (1) of the Act, this was an hour when it would have been unlawful to keep a shop open. K. appealed to the Divisional Court.

Held, allowing the appeal, that there was no relevant distinction between the barrow in this case and the van in *Stone* v. *Boreham* [1959] 1 Q.B. 1; neither could be said to be "a place where any trade or business is carried on," and therefore no offence under section 12 of the Act had been committed.

Per curiam: Where a stall is regularly erected on the same piece of land so that there is an aspect of permanency, or where a barrow has a fixed station in practice or by licence, the case may be different. [D. C.]

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[22] The appellant appeared in person. For the respondent: *Paul Wrightson* (instructed by Messrs. Sharpe, Pritchard & Co.).

Commentary. The Scottish case of *Nixon* v. *Capaldi*, 1949 S.C.(J.) 155 holds that a sale in the street is a sale in a "place not being a shop." The English court generally tries to follow Scottish decisions interpreting statutes which apply in both jurisdictions, so as to preserve uniformity; but in this case the court was bound by its own decision in *Stone* v. *Boreham* to hold the contrary.

TOWN AND COUNTRY PLANNING

Contravention of enforcement notice—change of user—permission

Cater v. Essex County Council

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Salmon JJ.: *The Times*, April 15, 1959.[23]

C. was charged with committing an offence under section 24 of the Town and Country Planning Act, 1947, in that he contravened an enforcement notice which stated: "development consisting of a material change of user has been carried out on the land . . . without the grant of permission required in that behalf under Part III of the Act, the said land being used for the purpose of a caravan site." The notice required C. to discontinue the use of the land for this purpose within three months.

C. had allowed caravans to park on the land without permission from the county council. He then applied to the county council for planning permission for this development, and the council refused to grant it; this refusal was upheld on an appeal to the Minister. The enforcement notice was then served.

The justices convicted C., who appealed.

Held, allowing the appeal, that since Class IV, paragraph 2 of the First Schedule of the Town and Country Planning General Development Order and Development Charge Applications Regulations, 1950, gave permission for the use of land for temporary buildings and uses for any purpose for not more than 28 days in any year, and since when caravans were first brought on the land there was a change of user, the enforcement notice was wrong in reciting that a change of use had been carried out on the land without permission; permission within the meaning of the Act had been given by the 1950 Regulations.

Per Donovan J.: This is a construction which will make the enforcement of planning control more difficult than ever and in some cases impossible. A simple amendment could cure the difficulty. [D. C.]

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[23] For the appellant: *R. E. Megarry, Q.C.*, and *R. Higgins* (instructed by Messrs. James & Charles Dodd). For the respondent: *F. H. Lawton, Q.C.*, and *J. G. Marriage* (instructed by Solicitor, County Hall, Chelmsford).

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Imprisonment

In R. *v*. KENT the court (Lord Parker C.J., Streatfeild and Hinchcliffe JJ.: March 23, 1959) affirmed a sentence of two years' imprisonment passed on K. at quarter sessions for using an air pistol with intent to resist arrest. K. had been in the pavilion at some playing fields when police attempted to enter. He produced the air pistol but was disarmed after a struggle. K. was a young man of seventeen years of age. The court stated that they did not think this was the type of case where the predominant consideration was the welfare of the accused. This was one of the class of cases where an example had to be made. Young law breakers who used lethal weapons to protect themselves and to avoid capture had to have it brought home to them that they would be severely punished. Something had to be done to stamp out this type of very serious offence which was so prevalent today.

In R. *v*. MANLEY, DURNFORD AND ANOTHER, the court (Lord Parker C.J., Donovan and Salmon JJ.: April 13, 1959) reduced sentences of five years' imprisonment to two years' imprisonment. M. and D. had been sentenced at the Central Criminal Court for receiving. [Another man convicted of the stealing received a similar sentence.] The court stated that it had been pointed out to them that this was not the ordinary case of receiving in the sense that they were men getting the property for little or nothing and selling it for their own advantage. In fact, the part they played was that some five days after the theft they were asked by the thieves to assist in moving the property and provided a van for which they received a fee. It was wrong, therefore, to look upon them as receivers in the ordinary sense of the word and, without in any way minimising the seriousness of their conduct and of the main offence, this court felt that the correct sentence in their cases was one of two years' imprisonment.

Corrective training

In R. *v*. FOSTER the court (Lord Parker C.J., Donovan and Salmon JJ.: April 13, 1959) affirmed a sentence of three years' corrective training passed upon G. at a Crown Court for attempted shop-breaking. The court stated that, so far as the sentence was concerned, they were of opinion that it was a proper sentence. There had been some doubt, however, whether F.'s health would enable him to undergo the sentence, and F. had produced a medical report showing that he was suffering from a heart disease. F. had now been examined by the prison doctors, and they had reported to this court that F. was physically fit for corrective training. Accordingly, there was no reason to interfere with the sentence.

In R. v. MILLS the court (Lord Parker C.J., Donovan and Salmon JJ.: April 13, 1959) varied a sentence of two years' corrective training to one of probation for three years. M. had pleaded guilty at quarter sessions to shop-breaking. M., who was a man of twenty-three years of age, had four previous convictions, in respect of which he had been in each case fined. The court stated that they had given leave to appeal in this case because of the sentence of two years' corrective training. It had been said many times that two years was too short a period for effective training. This court had now received a probation officer's report, from which it appeared that M. came from quite a good home; that his parents were prepared to have him and his wife to live with them; and that there had been a change of heart in M. since his imprisonment (which was now just over six months). This court thought it would be proper in the circumstances to give M. another chance by putting him on probation for a period of three years.

In R. *v.* THORLEY AND POWNER the court (Lord Parker C.J., Donovan and Salmon JJ.: April 13, 1959) varied sentences of borstal training to sentences of detention in one case, and probation in the other. T. and P. had been sentenced at quarter sessions for shopbreaking and larceny, eight other cases (for T.), and seven other cases (for P.) being taken into consideration. T. and P. were both young men of sixteen years of age and previously of good character. The court stated that apart from the present offences, neither of the accused had shown any criminal tendencies and that the sentences of borstal training were not appropriate. In T.'s case the proper sentence was one of three months' detention in a detention centre. With regard to P. it was reported that he was a good worker and trusted by his employers. The police had reported that he had taken a very minor part in the incidents and that he had been led into it by the other man. Accordingly, in P.'s case, a probation order for three years would be substituted for the sentence of borstal training.

Probation

In R. *v*. KEELEY the court (Lord Parker C.J., Streatfeild and Hinchcliffe JJ.: March 23, 1959) substituted a probation order for a sentence of eight years' preventive detention. K. had been convicted at quarter sessions of house-breaking, four other offences being taken into consideration. K., who was a man of thirty-five years of age, had twelve previous convictions. K.'s employer gave evidence that K. had " gone berserk " after being jilted by his employer's secretary, that he was a good workman, and that he was prepared to give K. a job away from the girl. The court stated that K. had shown himself to be mentally unstable. All the present offences flowed from K. having fallen in love with his employer's secretary. He had tried to burn down her house, tried to commit suicide, and for a period went berserk with housebreaking. K.'s employer had said that he was prepared to have K. back ; that he knew him well and thought he could control him ; and that K. had confidence in him. In these rather extraordinary circumstances this court felt that K. should be given another chance, and, accordingly, the court would substitute a probation order for three years for the sentence of eight years' preventive detention.

Acts and Orders *

Children

The Order of 1957 (S.I. No. 163) which prescribed the contribution to be made by the local authority named in an approved school order towards the expenses of the managers of the school in respect of the person to whom the order relates during the time when the person is under the care of those managers, has been revoked and re-enacted with amendments. The principal changes are that the contribution is reduced from £5 1s. 6d. a week to £4 11s. a week, and it is provided that no contribution is payable during any part of a period, after the first fortnight thereof, when the person to whom the Order relates is in hospital free of charge to the managers of the school or is unlawfully absent from the school. Operative April 1, 1959. APPROVED SCHOOLS (CONTRIBUTIONS BY LOCAL AUTHORITIES) REGULATIONS, 1959 (S.I. No. 548) (3d.).

The Adoption Societies Regulations, 1943 (S.R. & O. 1943, No. 1306) and the Adoption Societies Regulations, 1950 (S.I. 1950, No. 1368) are revoked and replaced with minor amendments; and the new Regulations are in part (Regulations 4 to 8) made to apply to local authorities who make or participate in arrangements for the adoption of children. The revoked Regulations did not in any way apply to local authorities. Regulations 7 and 8 (which relate to the confidentiality of information and records and to the preservation of records) are entirely new measures. Operative April 17, 1959. ADOPTION AGENCIES REGULATIONS, 1959 (S.I. No. 639) (6d.).

Food and Drugs

The use of special designations for retail sales of milk, which are provided for under the provisions of section 37 (1) of the Food and Drugs Act, 1955, are now brought into operation in certain areas of England and Wales in which they have not hitherto been in operation. Following the requirements of section 41 of the Act the Minister of Agriculture, Fisheries and Food and the Minister of Health have consulted representative organisations, which appeared to them substantially to represent the interests concerned, before the draft Order was laid before Parliament. The areas in which the relevant provisions of the Act are now brought into operation are set out in the Schedule. Operative April 6, 1959. MILK (SPECIAL DESIGNATIONS) (SPECIFIED AREAS) ORDER, 1959 (S.I. No. 446) (3d.).

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* Prepared by F. M. Drake, *Barrister-at-Law.*

For penalties for contraventions, see section 106 of the Food and Drugs Act, 1955.

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 438 (Camberwell) (2d.); 439 (Gravesend) (3d.); 651 (Chelsea and Westminster) (3d.); 652 (Shoreditch) (2d.).

Revenue

The list of banks and other persons authorised to deal in gold and foreign currency, and the list of authorised depositaries with whom certain securities are required to be deposited, under the provisions of the Exchange Control Act, 1947, are amended. Both operative April 10, 1959. EXCHANGE CONTROL (AUTHORISED DEALERS) ORDER, 1959 (S.I. No. 644) (3d.); (AUTHORISED DEPOSITARIES) ORDER, 1959 (S.I. No. 645) (4d.).

For penalties for contraventions, see Schedule 5 to the Exchange Control Act, 1947.

Scotland

Food and Drugs

Regulations have been made under the provisions of section 13 of the Food and Drugs (Scotland) Act, 1956 (4 & 5 Eliz. 2, c. 30), to secure the hygenic handling of food by any person who, or whose clothing, is liable to come into contact with food in the course of a food business, and for regulating the construction, equipment and maintenance of premises, vehicles, stalls, etc., in which food is handled. The Regulations do not apply to, or to persons handling food in, private dwellings or small boarding houses, dairies, agricultural holdings or cold stores and to those parts of certain other premises (*e.g.*, slaughterhouses, meat markets, docks and warehouses) where a food business is carried on otherwise than by retail. Part I of the Order deals with interpretations including the meaning of the expression " food business "; Part II sets out requirements to be complied with by persons who are handling food, including notification of diseases likely to cause food poisoning; Part III contains provisions for securing the cleanliness of equipment with which food comes into contact, the treatment of certain kinds of food and the disposal of refuse; Part IV sets out requirements in respect of the drainage, sanitation and lighting, etc., of food premises, and Part V deals with vehicles and stalls. Part VI deals with penalties for contraventions and also provides for certificates of exemption being granted in respect of premises which cannot reasonably be expected to comply with the requirements of those regulations specified in the Second Schedule. Certificates may be granted by county councils and large burghs (which are the local authorities responsible for enforcing the regulations) and there is a right of appeal to the Sheriff against decisions of the local authority. Operative May 1, 1959, save for certain regulations detailed in the First Schedule which are operative October 1, 1959. FOOD HYGIENE (SCOTLAND) REGULATIONS, 1959 (S.I. No. 413) (6d.).

For penalties for contraventions, see Regulation 33 of the Order.

New provisions relating to the labelling and designation of ice-cream are brought into force from April 27, 1959. These provisions (a) prohibit the labelling, marking, or advertising of ice-cream in a manner suggestive of butter, cream, milk or anything connected with the dairy interest unless the ice-cream contains no fat other than milk fat (apart from fat introduced by the use as an ingredient of any egg, any flavouring substance or any emulsifying or stabilising agent) but permit the presence of skimmed milk solids to be declared; (b) impose requirements as to the labelling of pre-packed ice-cream containing fat other than milk fat (apart from fat introduced through an ingredient as aforesaid). The Labelling of Food Order, 1953 (S.I. 1953, No. 536) (which Order has effect in Scotland as if contained in regulations made under section 7 of the Food and Drugs (Scotland) Act, 1956), is amended in order to insert these new provisions, and minor drafting changes are also made to Tables A and C of the First Schedule to the Order. Operative April 27, 1959. LABELLING OF FOOD (AMENDMENT) (SCOTLAND) REGULATIONS, 1959 (S.I. No. 571) (3d.).

For penalties for contraventions, see section 40 of the Food and Drugs (Scotland) Act, 1956.

Amended standards of composition for ice-cream and " Parev " (kosher) ice are prescribed; and separate standards of composition for dairy ice-cream and milk ice are introduced. Alternative standards are prescribed for certain descriptions of ice-cream containing fruit, fruit pulp or fruit purée. The Order of 1953 (S.I. No. 828) is revoked and replaced by this Order. Operative April 27, 1959. FOOD STANDARDS (ICE-CREAM) (SCOTLAND) REGULATIONS, 1959 (S.I. No. 572) (3d.).

For penalties for contraventions, see section 40 of the Food and Drugs (Scotland) Act, 1956.

Court of Session

Provision is made for an increase in fees and outlays by solicitors acting for assisted persons under the Legal Aid (Scotland) Act, 1949, in undefended consistorial actions. The earlier Order prescribing the fees and outlays (S.I. 1954, No. 1313) is revoked. Operative March 10, 1959. ACT OF SEDERUNT (ALTERATION OF COURT OF SESSION FEES), 1959 (S.I. No. 584) (3d.).

Provision is made for appeals and special cases from certain tribunals under the Tribunals and Inquiries Act, 1958, and the Rules of the Court of Session are amended accordingly. Operative March 10, 1959. ACT OF SEDERUNT (RULES OF COURT AMENDMENT No. 2), 1959 (S.I. No. 585) (3d.).

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 3 Chancery Lane, London, W.C.2." The questions of readers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

57. *Brothels—living on earnings of prostitution*

I recently kept observation on premises with the result that X was convicted of keeping a brothel.

The observation showed that X was the sole occupier of a ground-floor flat and that, nightly, two prostitutes used the flat for the purpose of sexual intercourse. X was seen to be actively engaged in admitting the couples and in organising their movements.

Neither prostitute lived at the premises, each arriving during the evening and leaving in the early hours of the morning. The women solicited at the door of the premises and X was frequently in their company whilst they solicited. X was seen to accept money from both women.

X was not in any employment and his sole legal income consisted of £2 5s. from the National Assistance Board. He paid £2 10s. per week rent for the flat and during the five-day observation spent money freely, frequenting public houses every evening.

The above facts show that, apart from keeping a brothel, X was also living on the earnings of prostitution. Although the money X received from the woman was undoubtedly for the use of the rooms the facts differ from those in the case of *R.* v. *Silver* in that, in that case (*Silver*) the defendants were landlords and estate agents and it was their business to let rooms.

Would there be any objection, legally or as a matter of practice, to charging X with both offences, *i.e.*, under section 33 and section 30, Sexual Offences Act, 1956, as a result of the one observation? I have been directed that it would be bad practice as the evidence to be given to support both charges would be identical.

I fail to agree with this point of view and consider that the offence under section 33 would be complete without any evidence of X's means or of money passing to X and that this additional evidence would justify the additional charge of living on the earnings of prostitution.

I was then surprised to read in *Archbold*, § 2597, the following:

Indictment for keeping a brothel
Particulars of offence

A B, on the —— day of ——, and on other days between that date and the —— day of ——, in the county of ——, *for the purpose of gain*, kept and maintained a brothel called ——.

I would be obliged for your opinion on the above and for any comment you may make on the inclusion of the words "for the purpose of gain" in the above Particulars of Offence when the statute creating the offence makes no reference to gain. [F. C.]

ANSWER

Section 33 of the Sexual Offences Act, 1956, provides that "It is an offence for a person to keep a brothel, or to manage, or act or assist in the management of, a brothel." There is no mention made of gain and in my opinion gain is not an essential element of this offence. It is well established that a place may be a brothel even if the women using it do so merely for the purpose of fornication without receiving any payment for the fornication; permitting premises to be used as a brothel simply means permitting premises to be used so that persons of opposite sexes come there and have illicit intercourse (see *Winter* v. *Woolfe* [1931] 1 K.B. 549, at 555, *per* Avory J.) In that case a country house and restaurant was frequented by Cambridge undergraduates and working class girls; there was evidence that they went there to amuse themselves by dancing, etc., but that they behaved immorally and frequently had illicit intercourse there. There was *no* evidence that the person who kept the premises made any money from these premises or from their use for this illicit intercourse, save what was charged in the ordinary way for the sale of refreshments. On an appeal from a decision of the justices dismissing a charge against the occupier of the premises, under the provisions of section 13 (2) of the Criminal Law Amendment Act, 1885 (now substantially re-enacted as section 35 of the Sexual Offences Act, 1956), the Divisional Court (Avory, Acton and Swift JJ.) allowed the appeal and held that there was evidence of the premises having been used as a brothel despite the complete lack of evidence that the women who resorted there did so for money.

I am therefore of the opinion (a) that the words "for the purpose of gain" used in the form of indictment in *Archbold* (§ 3856 of the 34th Edition) are unnecessary and (b) that *technically* X in this case could be charged with and convicted of both the offences mentioned in the question. But in practice proof of gain is very, very frequently an important element in establishing that the premises are being used as a brothel; and in practice the evidence to prove the two offences so overlaps that I agree with the objection raised to charging X with offences under both section 33 and section 30. [M. D.]

Books and Periodicals

King Mob. By Christopher Hibbert. London: Longmans, Green & Co. 1958. 172 and (biblio and index) 12 pp. (21st. net.)

The most significant aspect of the Gordon Riots, those days in 1780 when the mob took control of London and gave the capital a foretaste of what Paris was to experience nine years later, is perhaps their relative insignificance. For almost a week authority was flouted, members of both Houses were submitted to the grossest indignities and wilful damage was done to property and person which exceeded that resulting from successful revolutions elsewhere. Yet not only was there no immediate change in the established order—either towards reform or, more surprisingly, towards greater restriction—but there was little suggestion that any radical change was looked for.

In *King Mob*, Mr. Hibbert vividly describes the course of these few days. The immediate cause was the agitation of the Protestant Association, under the influence of Lord George Gordon, for the repeal of legislation which ever so slightly relaxed the restrictions imposed on Catholics. What began, however, as a mass demonstration accompanying a mammoth petition rapidly grew out of hand and the mob, excited by agitators, broke open the gaols, burnt down the houses of Catholics, judges, Members of Parliament and all those who caught their dislike and gave London up to complete licence. The decrepit and corrupt constables and watchmen were incapable of acting; the justices, with a few honourable exceptions, wholly disinclined to act. Seldom has disorder more wholly vanquished law.

It was finally only as a result of the firm action of George III, in securing an authoritative legal opinion that a reading of the Riot Act by a justice of the peace was not a necessary precondition for the military to come to the aid of the civil power, a legal heresy which had hitherto unaccountably held sway, that the army was enabled to restore order.

Mr. Hibbert's account is lively and admirably documented from the many contemporary accounts of the Riots. It is perhaps open to question whether the many conflicting sources are really susceptible to reduction to so clear a narrative but the simplification greatly enhances readability. It is a book which it is genuinely difficult not to read at a sitting.

Mr. Hibbert leaves a number of questions unanswered—we shall probably never know the truth. How did a peaceful demonstration so rapidly grow out of hand? How was the mob so well organised? Who determined the targets for the mob's attacks, delivering threatening warnings hours before the attack came? Nor does he touch on the causes of the deplorable condition of the policing of the metropolis and the almost unbelievable failure of authority, even after such a warning, to take any resolute action for another fifty years. But these are complex questions which would have called for discussion of material ranging far beyond the riots themselves. More seriously, perhaps, Mr. Hibbert does little to set the riots in their background of earlier mob rule in which Wilkes and his unscrupulous political agitation played so large a part. The mob which had been trained to cry "Wilkes and Liberty" had little difficulty in changing their tune to "Gordon and Liberty." But these are minor blemishes.

Despite their gravity the Gordon Riots had virtually no consequences—a singular memorial to the aridity of demonstrations unsupported by a widely felt reforming enthusiasm, and to the savagery of the Englishman's "sturdy individualism," remarked on by Taire almost a century later. Mr. Hibbert has done well in casting a spotlight on this wretched episode, so discreditable to nearly all concerned.

G. I. de D.

Book for the Police. We regret that in our review of this book at page 350 the price was incorrectly stated. It should be £12 17s. 6d. *not* £12 7s. 6d.

Books received:

Privileged Communications between Physician and Patient. By Professor Clinton DeWitt. Illinois: Charles C. Thomas; Oxford: Blackwell Scientific Publications. 1959. 474 and (index) 54 pp. 87s. 6d. net.

The Child and the Court. By W. E. Cavenagh. London: Victor Gollancz. 1959. 239 pp. 21s. net.

Contraband Cargoes. By Neville Williams. London: Longmans Green & Co. 1959. 289 and (index) 11 pp. 25s. net.

Police. By John Coatman. London: Oxford University Press. 1959. 242 and (index) 8 pp. 7s. 6d. net.

Advocacy at Petty Sessions. Second edition by B. Fraser Harrison. London: Sweet & Maxwell, Ltd. 1959. 117 and (index) 4 pp. 15s. net.

Lord Goddard. By Arthur Smith. London: Weidenfeld and Nicolson. 1959. 208 pp. 21s. net.

The Badge. By Jack Webb. London: W. H. Allen. 1959. 310 pp. 18s. net.

Readers' digest:

Abortion: Abortion and the law: 26 *Medico-Legal Journal* 92.

Confession: Threats, based on *R.* v. *Smith*: 227 *Law Times* 244.

Diminished responsibility: 1959 *Scots Law Times* 85. Scottish authority and the interpretation of the Homicide Act: 227 *Law Times* 227.

First Offenders Act, 1958: 123 *Justice of the Peace* 167.

Fraud: 227 *Law Times* 188.

Murder: Capital murder and the thief: 103 *Solicitors' Journal* 277.

Shops: Shops and parts of shops: 103 *Solicitors' Journal* 264.

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Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review*, 3 CHANCERY LANE, LONDON, W.C.2. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

THE

CRIMINAL LAW

REVIEW

July 1959

Costs in criminal cases

The searchlight which the national press operates in its constant search for " bogies " with which to haunt its readers has recently been focused on the question of the incidence of costs in criminal cases. What the searchlight revealed on this occasion is, however, a situation deserving of serious consideration and we are pleased to note that the Home Secretary has stated that he is reviewing this situation.[1]

Leaving aside the emotionally charged circumstances of the prosecution which caused the original outcry, the question remains whether it is right that an accused person who is acquitted in a criminal court should have to bear the costs, often substantial, of a successful defence.

As the law now stands, under the provisions of the Costs in Criminal Cases Act, 1952, the courts *may* order the payment out of local funds of the accused's costs on acquittal. The exercise of this discretion has, however, been inhibited by a Home Office circular [2] which directed (in respect of an earlier, similar provision) that a mere acquittal ought not in itself to constitute a ground for the exercise of the power to award costs, and by a *Statement on Costs* [3] by Lord Goddard C.J., in which he said:

> " It was never intended, and it would be quite wrong, that costs should be awarded as of course to every defendant who is acquitted. Its use should be reserved for exceptional cases, and every case should be examined on its merits."

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[1] House of Commons, June 10.

[2] No. 193/1948.

[3] (1952) 36 Cr.App.R. 13.

It is, we feel, with this in mind that the Chairman of London Sessions made the statement for which he has been so strongly criticised: that the innuendo that a person acquitted is obviously an innocent person is one which "requires a little thought." It is often the case that an acquittal results from a badly prepared prosecution or a purely technical defence, and the award of costs against the police in such cases would clearly be unjust.

On the other hand, while the examination of each case on its merits is clearly the ideal solution, and to leave the question to the discretion of the court is the only solution, we feel that it is putting the cart before the horse to suggest that cases in which acquittal and innocence coincide is the exception to the rule.

A further direction removing the words "Its use should be reserved for exceptional cases" would be desirable. But, in the public interest, if the award is to be made, as it should be, from public, as opposed to police, funds, there should be a discretion to decide what costs are reasonable in a particular case.

Probation Service Committee

The members of the Home Office Departmental Committee on the probation service are as follows: Mr. R. P. Morison, Q.C., Chairman, Mr. A. J. Chislett, Mr. G. C. Lightfoot, Mrs. L. M. H. McAdam, M.B., CH.B., J.P., Councillor, J. Mains, O.B.E., J.P., Alderman E. E. Mole, J.P., Mr. T. A. F. Noble, Miss R. N. Pearse, O.B.E., Mr. N. J. Skelhorn, Q.C., Sheriff J. Aikman Smith, Alderman P. J. Smith, M.B.E., D.L., J.P., Mr. H. F. R. Sturge, Dr. J. D. Sutherland, PH.D., M.B., CH.B., D.P.M., and Miss Eileen L. Younghusband, C.B.E., J.P.

Miss W. M. Goode of the Home Office and Mr. A. J. Betts of the Scottish Home Department will act as assessors; Mr. A. J. E. Brennan of the Home Office and Mr. J. E. Fraser of the Scottish Home Department will be respectively Secretary and Assistant Secretary.

The Committee's terms of reference are:

"To inquire into and make recommendations on (*a*) all aspects of the Probation Service in England and Wales and in Scotland, including recruitment and training for the Service, its organisation and administration, the duties of probation officers, and their pay and conditions of service having regard to their qualifications and duties and to pay and conditions of service in related fields; and (*b*) the Approved Probation Hostel system in England and Wales and in Scotland.

Judicial appointments

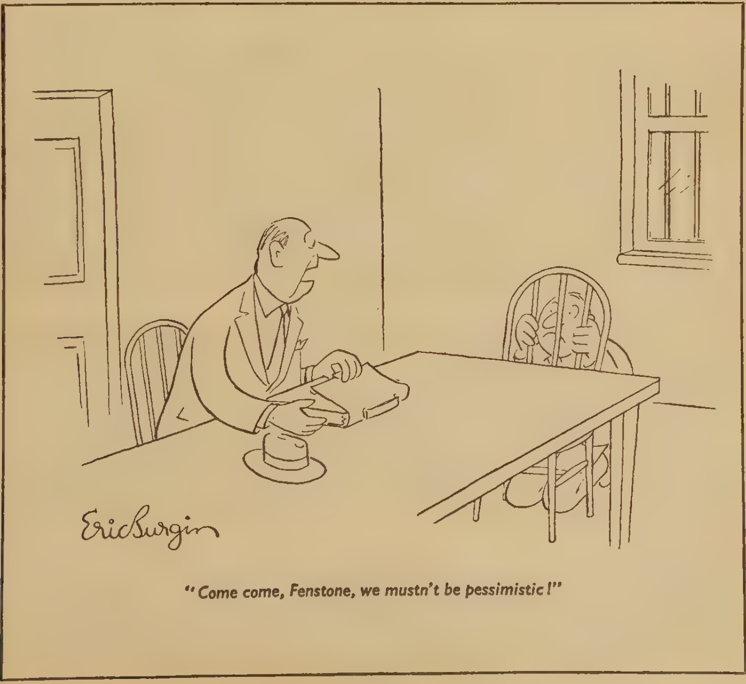
John Mervyn Guthrie Griffith-Jones, Esq., M.C., has been appointed Recorder of the City of Coventry. John Frederick Eustace Stephenson, Esq., has been appointed Recorder of the City of Winchester. Harold John Brown, Esq., M.C., Q.C., has been appointed Recorder of the City of Norwich.

R. v. Gammon

The instructing solicitors for the appellant in the above case, reported at page 448, *ante*, were Messrs. Girling, Wilson and Harvie of Herne Bay, not Messrs. Girling, Wilson and Harris as stated. We regret any inconvenience caused by this error.

August issue

We regret that owing to the dispute in the printing trade the August issue may be published late.



"Come come, Fenstone, we mustn't be pessimistic!"

Prosecuting Officer

By Christopher Williams

Past Imperfect

"Ah, yes, Newman, come along in and sit down," said Superintendent Portly, waving a sunbrowned hand towards a chair on the other side of his paper-strewn desk. "Character, previous convictions and so on, wasn't it? Now, what exactly is the trouble?"

"Well, sir," replied the Inspector, with a baffled frown, "I've done my best to dig it all out of the books, but all I can get out of it is a hotch-potch of contradictory rules, each with a string of exceptions. As far as I can see, there's nothing for it but just to get right down to it and learn the whole lot off by heart. And quite honestly, sir, I feel I'm getting a bit long in the tooth for that sort of thing."

"I should think so, too," laughed Portly. "It's obvious to me you haven't got the hang of the thing at all. Take it from me, nearly everything in the law has got a reason behind it, and when you find yourself having to learn things off by heart, as if it were poetry, it means you just haven't understood what's behind it. You want to sit back and try to see *why*, then ten to one you won't have to learn *what*. Once you've understood the reason, you'll never forget the results. After all, you must realise that all this 'hotch-potch,' as you choose to call it, is the result of well-meant efforts of a lot of learned but practical men, such as judges and members of parliament, to keep the law fair and effective at the same time."

"I hope you're right, sir, that's all," said Newman dubiously. "But so far I haven't managed to sort out the difference between 'character,' 'previous convictions' and 'similar acts'—they all seem to slide into each other, when it comes to dealing with them in court. Then there's the difference between an accused person and witnesses, and what happens when the accused becomes a witness. As to accepting answers, calling rebutting evidence and accomplices . . ."

"All right, all right," interrupted Portly, flapping a hand as though to stem the flood of confusion. "Let's get right back to the beginning, shall we? D'you remember our little chat in this office, just after you were posted here on promotion? We were talking about the nature of evidence, you remember. We said that you can only give evidence of facts if they were both relevant and admissible.[1] Well, let's go a bit deeper into that. Now, to my mind, that's not the clearest way of putting the matter. I think it's like arguing in circles. Put it this way. The court wants to know all the necessary facts for it to come to its conclusion as to whether the accused person committed the illegal act of which he is accused. Now it obviously won't want to hear any facts that have nothing to do with the case; it only wants to know about facts that constitute the offence, and facts that explain the facts that constitute the offence. In other words, it wants to know only about the facts in issue, and any facts relevant to the facts in issue. And so you (and the defence, don't forget) will be allowed to give evidence only of facts in issue and facts relevant to the issue. Conversely, if a fact is in issue, or is relevant to the issue, then you can give evidence of it, it is admissible; and if it is neither in issue nor relevant to the issue, it is inadmissible. So that's your basic rule. Right? "

" Yes, sir, that's all clear," said Newman. " Except, of course, that it must be a bit hard sometimes to say when a fact is in issue, or when it is merely relevant to the issue, or even not relevant at all."

" Nothing in it, Newman, take it from me," said Portly airily. " Take a shooting in Brighton, say. In issue—presence of the accused in the room with the dead man, possession by him of the gun, his pulling the trigger, words said by him at the time, connection between firing the bullet and the death, necessary malice, intent, and so on; all that sort of thing, in other words, the facts amounting to the wording on the indictment. Relevant to the issue—purchase of gun by accused, accused seen boarding a train for Brighton at Victoria that morning, seduction by dead man of accused's wife, blood on clothes, false *alibi,* things like that. Not relevant at all—his Auntie's birthday, anything you like that seems to have no connection at all with the affair. Get the idea? But don't forget this, though, even his Auntie's birthday may become relevant as the trial goes on—he may say yes, he was going to Haywards Heath to call on his Auntie with a birthday present because it was her birthday. So the old girl's birthday becomes relevant—he can prove it was her birthday, you can prove it wasn't."

" That's a point that wants watching, then, sir," said Newman thoughtfully. " I mean, if a thing starts off by looking irrelevant, and therefore inadmissible, it may suddenly become relevant and therefore admissible."

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[1] [1959] Crim.L.R. 98.

"Ah, but that's just the basic rule," said Portly. "Like most other rules, there is a qualification. Although a fact may be relevant, and would therefore be admissible, sometimes, for one reason or another, the law steps in and excludes it. For instance, a confession made by the accused is obviously relevant, and you would expect it, therefore, according to the basic rule, to be admissible. But it is only admissible, says the law, when you can prove it was voluntary. But the exception that really concerns us more at the moment is that previous bad character or convictions, though obviously relevant in the sense that a crook is more likely to commit a crime than an honest man, is generally inadmissible, despite the general rule, because otherwise an accused man would, to quote a very old case, be 'overwhelmed by prejudice' instead of being convicted on good, affirmative evidence.[2] To let in a man's whole past life would obviously tend to make the jury say: 'This man is charged with crime, the police think he did it, and he is clearly of criminal habits; therefore he must be guilty.'[3] All right so far?"

"Yes, sir, thank you," said Newman. "I'm with you up to there. If I've got it right, it is that a man's character, which shows his disposition, indicates the likelihood that he will commit certain acts; in other words, a criminal disposition suggests criminal acts. Therefore, character is relevant, and so are previous convictions; but, as far as an accused person is concerned, the law steps in and says that, though relevant, these things are not admissible after all, because they would tend to weight the scales too heavily against him. . . ."

"Yes, an *accused* man," interrupted Portly, waving a warning finger at the Inspector. "That's important. As far as anyone else in the case is concerned, they remain admissible, because there is no such rule of law to protect them."

"How d'you mean, sir, anyone else in the case?" asked Newman. "Surely that only leaves the witnesses."

"Exactly," replied Portly. "The character of any witness is always relevant and therefore admissible. After all, that's only reasonable. I mean, if you or the accused man is asking the court to believe the word of a witness, the court is entitled to know if he is a blackguard."

"Yes, I see that, sir," said Newman. "But what happens when the accused man himself turns witness? What happens to his protection? "

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[2] *Hampden's Case* (1684) 9 St.Tr. 1103.

[3] Glanville Williams, *The Proof of Guilt*, p. 157.

"He keeps it," replied Portly. "I suppose the theory is that the benefit the court gets from knowing how much weight they can attach to his evidence is far outweighed by the unfairness to the accused entailed in disclosing his bad character. At all events, even when the accused man becomes a witness, his character and so on are still inadmissible—not, remember, because they are not relevant (indeed, they are), but because there is a rule which says they are inadmissible because of prejudice."

"Right, sir," said Newman. "I think I've got all that clear." He paused for a moment, and then went on, "A basic rule, with a general exception: if it's relevant, then it's also admissible, excepting when there is a rule of law saying it isn't. Then, two applications of that rule, each having the same exception: first, character and so on are relevant and therefore admissible, excepting when it is the accused man's character; second, a witness's character is relevant and therefore admissible, excepting when the witness is the accused man. What next? I know there are lots of times when the accused man's character is relevant, in spite of these rules; what about them? Are they exceptions to the exceptions? "

"Well," replied Portly. "That's where I think the books tend to confuse you, because that's how they put it sometimes. I'm afraid I look at it another way. Now, the basic rule you just mentioned is all right, but you've condensed it too much for accuracy. You'll remember that the full rule is that evidence is admissible only as to facts in issue and facts relevant to the issue—two groups of facts, you see. So far, we've really only spoken about character as being a fact relevant to the issue, when we said it is admissible excepting when it is the accused man's. But there is no such exception to the rule when the character is actually in issue, as opposed to being merely relevant to the issue. When character and the rest are in issue, they are always admissible. For instance, suppose an accused man's bad character consists of a previous conviction for larceny. Now, if the present charge is larceny, the previous conviction is relevant to the facts in issue, that is, to the present charge of larceny, on the principle that a man with a thieving disposition is likely to commit theft; but is inadmissible because of prejudice. But if the present charge is one of being a reputed thief loitering with intent to commit felony, then the previous conviction of larceny is obviously in issue—that's to say, you've got to prove it if you want a conviction—it's an essential ingredient of the offence charged—and so it is automatically admissible, with no exception in the accused man's favour. D'you follow me? "

" I think so, sir," said Newman, with a deepening frown. " Basic rule, split into two parts: first, facts relevant to the issue, admissible excepting when a rule of law excludes them; second, facts in issue, always admissible, no exceptions. Then two applications of these two rules: first, when character is only relevant to the issue, admissible, excepting, for example, when the character is the accused man's; second, when character is actually in issue, always admissible, no exceptions. But it seems to me, sir, that there's a lot of cases we've got to fit into this ' character in issue ' class. I can see how the ' suspect ' fits in, but surely there are lots more."

" Yes, there are," said Portly. " But, with the exception of one special group which I'll come back to in a minute or so (I shall be calling them the ' similar acts ' group), they are all cases in which character is quite obviously in issue. The example I gave you is one created by statute; there are several others, but I won't go through them at the moment, as we want to get the principles clear first. It will be enough just now to say that they fall into two groups. One, where the law creating the offence puts the accused man's character in issue; put another way, where the accused man's character is an integral part of the offence. Two, where the accused man puts his own character in issue by his own conduct."

" I suppose you mean the Criminal Evidence Act of 1898, sir? " asked Newman, pleased for once to be able to be one step ahead of the Superintendent. " The accused man calls or gives evidence of his own good character, or makes imputations on the character of the prosecution witnesses, so you can ask him questions about previous convictions. That one? "

" Yes—but ' may be allowed to ' is better than ' can,' " said Portly. " And a word of warning—it's the Criminal *Evidence* Act, with the emphasis on the word ' evidence.' By that I mean that you can only resort to the Act if the accused man goes into the box and gives evidence, because your right is limited to cross-examining the accused, and you can only do that if he gives evidence. If he merely calls evidence of his own good character, but steers clear of the box himself, you have to fall back on the common law rule; he will have put his character in issue all right, but you will be able to counter it only by calling evidence of general reputation, whereas if he gets into the box you can actually bring out specific previous convictions.[4] But never mind all that now. I don't want to fill in all the details at this stage."

"All right, sir," said Newman. "But what were you going to say about the 'similar acts' group? Where do they fit in?"

"They're rather tricky, really," said Portly. "I'm no lawyer, and I can't really make up my mind about the best place for them. On the one hand, you could say that they represent an exception to the exception to the rule that character is relevant and therefore admissible." Here the Superintendent broke off, feeling that he was losing his way a little. But Newman sprang to his rescue, as a good Inspector should.

"D'you mean, sir," he said, "that the rule is that character is relevant, and therefore admissible, excepting when it is the accused's, but that even the accused's character becomes—or, rather, remains—admissible when it falls into the category you call 'similar acts'?"

"Well, yes," replied Portly, a little nettled. "You could put it that way if you like. But, as I was saying, you could also explain them, on the other hand, as being instances in which character is actually in issue."

"I'm not quite sure I follow you, sir," said Newman. "Perhaps it would become clearer if we could go a little way further into them—not fully, of course, sir," he added hurriedly, "I know you want to get away." Newman thought fleetingly of a deck chair under the trees in his garden.

"Well, Newman," said Portly, with a quick glance at the clock over the fireplace. "Putting it quite shortly, there are these cases in which you *may* be allowed to give evidence of previous acts by the accused which, because a general similarity to the offence charged, tend to show that the accused is guilty of that offence, by showing guilty knowledge, or criminal intent, or establishing identity or disproving mistake and the rest of them. Now suppose the similar act tends to show criminal intent. Criminal intent is always an integral part of the offence charged, and therefore it is always in issue. Therefore you might argue that 'similar acts' are a form of character which is admissible because it is in issue. On the other hand, take identity. That may not be in issue, as where the accused admits he was there, but claims the act was not criminal. The 'similar acts' would not be admissible in that case. So it's a little hard to decide how you can treat them as one single group, either admissible because they are in issue, or admissible as exceptions to the rule about relevancy."

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[4] Glanville Williams, *op. cit.*, p. 160, n. 4.

"I think I can see the difficulty, sir," said Newman brightly. "I don't yet know much about the various instances of this group, and I hope you'll find time to explain them more fully some day soon. But, for the moment, just to be able to fit them into the general pattern, would it do to say that they start off by being relevant, and therefore admissible were it not for the exception in favour of the accused, but that they may cease to be merely relevant, and become actually in issue, either as integral parts of the offence charged, or by reason of the line taken by the defence? In that way you do not disturb the simple rules we started with—one, that character is relevant and therefore admissible, excepting when it is the accused man's; and two, that when character is not merely relevant but actually in issue, it is always admissible."

"Seems a good enough way of putting it, Newman," said the Superintendent, nodding approvingly. He glanced at the clock again. Might be a goodish hatch this evening, he mused. He stirred himself into activity, and began scooping the scattered papers into a pile, and thrust them into a tray marked "Pending." Then he pressed a switch marked "Clerk," and spoke briefly into a microphone box. Then he looked up at Newman.

"D'you know, Newman, I believe you'd keep me here all night, the way you talk. It'll have to wait till another time, the rest of this." The Superintendent's gaze wandered to the corner by the door. Inspector Newman's eyes followed Portly's glance, and rested momentarily on the long, tapering case of soft canvas, the bulging leather-bottomed bag, the wicker creel. Hastily he turned back to his superior.

"Ah, yes, sir," he said blandly. "I know you're very busy, and I'm only sorry to have kept you so long, sir. Perhaps you could spare me half an hour some other time, go into a little more detail—I can see I've got a lot to learn, sir. Well, thank you, and good afternoon, sir."

[*To be continued.*]

Offences under Sections 11 and 12 of the Road Traffic Act, 1930

By Keith C. Clarke,
Prosecuting Solicitor, Southampton Corporation

3. Proving the offence

The third and most important element which the prosecution must prove in cases under sections 11 and 12 is that the vehicle in question was driven *without due care and attention* or *without reasonable consideration for other persons using the road* (if under section 12) or in a *manner dangerous* or at a *speed dangerous* to the public or *recklessly* (if under section 11). It will be seen that section 12 creates two separate offences, whilst section 11 creates three separate offences. In respect of all three offences under section 11, the court must have regard to " all the circumstances of the case, including the nature, condition, and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road."

If the prosecution are unable to adduce evidence as to the manner in which the vehicle was, in fact, driven, the defendant will have no case to answer. This is illustrated by the following example: two cars come into collision at a cross-roads, having been driven on roads of equal importance. The police separately charge both drivers with careless or dangerous driving, and neither of the defendants gives evidence. There is no independent eye-witness to the accident, and the only evidence called by the police against each defendant is to the effect that (1) both vehicles were seen locked together in the centre of the road junction after the collision, (2) each defendant admitted to a police officer that he had been driving one of the vehicles prior to the impact, and (3) each defendant would have had a good view of the road upon which the other vehicle was being driven as he approached the junction. In these circumstances, it would be proper for the court to dismiss both cases on the ground that the prosecution had not proved that the defendants were driving carelessly or dangerously, but had asked the court to *assume* that they were, and that, in proceedings under sections 11 and 12, the doctrine of " *res ipsa* *loquitur* " does not apply on its own to prove the case.[1] The case of *Edwards* v. *Clarke*,[2] mentioned in the first article in this series, affords a similar example. What is required in the example given above is some evidence, in addition to that already mentioned, indicating the manner in which, and the speed at which, the vehicles were driven prior to the impact. Such additional evidence might be obtained by the prosecution calling one defendant as a witness against the other, assuming that each case is heard separately, and subject to the qualification that such a witness would not be obliged to answer any questions tending to criminate him.[3] On the other hand, assume, in the above example, that this additional evidence is not forthcoming, but that each defendant has made a statement to the police saying that he approached the cross-roads at thirty miles per hour, never slowed down and never saw the other car until the moment of impact. In such circumstances, the prosecution would be in a position to argue that the *circumstantial evidence* was clear and unambiguous, and that the only conclusion to be drawn from it was that the defendants had been driving carelessly or dangerously. However, it should be noted that the prosecution can only rely upon circumstantial evidence to prove that the defendant's vehicle was driven carelessly or dangerously where such evidence is clear and unambiguous and admits of one explanation only. It is often difficult to anticipate what view the court will take of circumstantial evidence only in cases under sections 11 and 12, and no two such cases are alike in every particular, but in 1941 *Journal of Criminal Law*, reference is made at p. 148 to the Scottish cases of *Carrodus* v. *Paterson* [4] and *McWhan* v. *Williamson*,[5] in which the High Court of Justiciary upheld convictions for careless driving where detailed evidence was given as to the position of vehicles after the collision, the *locus in quo* and skid marks, etc., but where no damaging admissions had been made by the defendants and no eye-witnesses to the accidents were available.[6]

What standard of care does the criminal law expect a driver to show? In *McCrone* v. *Riding* [7] Lord Hewart C.J., speaking of section 12, said: " I think that it is not without significance that the statute uses both the word ' care ' and the word ' attention.' In other words, the driver, whoever he may be, experienced or inexperienced, must see what he is about. He must pay *attention* to the thing he is doing, and, perceiving that which he is doing or entering upon, he must do his best, and he must show proper *care* in the doing of that thing upon which he is intent." In this case, it was held that, because the standard of care is an objective one, and is fixed in relation to the safety of other people using the highway, the justices were wrong in dismissing a summons for careless driving on the ground that the defendant was exercising as much care as could be expected from a driver with his short experience. Similarly, the standard of care in civil law is an objective one and the motorist is under a duty to drive with that degree of care which in similar circumstances would have been used by an ordinary skilful driver, *i.e*., he must drive with "reasonable care."[8] The standard of care is, therefore, the same for a criminal charge as for a civil complaint.

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[1] *Alexander* v. *Adair*, 1938 S.C.(J.) 28.

[2] (1950) 115 J.P.N. 426.

[3] *Att.-Gen.* v. *Egan* [1948] Ir.R. 433.

[4] 1939.

[5] 1941.

[6] The problem is also discussed in 119 J.P.N. 616 and (1957) 21 Journ.Crim. Law 109.

[7] [1938] 1 All E.R. 157; 102 J.P. 109.

In deciding whether, in a particular case, a driver has not exercised proper care so as to make him guilty, at least, of an offence under section 12, undoubtedly the most reliable guide is the Highway Code, since, by virtue of section 45 (4) of the 1930 Act, failure to observe any of its provisions may be relied upon by either party as tending to establish or negative liability in any criminal or civil proceedings. However, the advocate should be fully acquainted with the case law relating to the duties of a driver in various circumstances, because, whilst it is appreciated that each new case must be decided on its own special facts, reference to such case law will often assist the court and prevent time being wasted in arguing a point which has already been settled. The reader's attention is, therefore, drawn to the following matters:

Duty of driver when giving signals

The driver who intends to turn right and thus cut across a line of traffic must not merely give a signal of his intention to do this, but, in addition, before proceeding, should either (1) ensure that his signal has been understood by other traffic on the road and, in particular, traffic following him, or (2) slow down or stop and allow following traffic to overtake him and oncoming traffic to pass him.[9] In the last-mentioned case, it was held that a defendant, who drove on without troubling to ascertain whether his hand signal that he was about to turn right had been understood by the driver of a vehicle which he knew was gradually overtaking him, was guilty of an offence under section 12. The same line of reasoning seems to have been followed by the Divisional Court in

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[8] *Hambrook* v. *Stokes* [1925] 1 K.B. 141.

[9] *Sorrie* v. *Robertson,* 1944 S.C.(J.) 95.

Pratt v. *Bloom.*[10] In this case, X was driving a taxi-cab along a road and was told by his fare to turn left. He put on his right blinking indicator and Y, who was driving a car behind him in the same direction, upon seeing this, began to overtake X's cab on the nearside. The fare saw X's right indicator and corrected him, whereupon X, without taking any precaution to see whether traffic was coming up behind him, put on his left indicator and immediately turned left into the path of Y's car. The court decided that X was at least guilty of careless driving. It has been held in a civil case that automatic stop lights are not in themselves sufficient warning to following traffic.[11]

Duty of driver when moving forward or reversing

The driver of a heavy vehicle who intends to pass a stationary vehicle ahead of him in a narrow road should, if necessary, alight and ascertain whether there is sufficient room. If he does not alight, but simply reduces speed and relies upon the directions of a servant or friend, with the result that he collides with the stationary vehicle, then he will have been negligent.[12] In 1954 *Journal of Criminal Law* a case is reported at p. 120 of a lorry-driver who, whilst backing his lorry in a cul-de-sac towards the main road, collided with an elderly woman who was crossing the cul-de-sac behind the lorry. The defendant never saw the woman until after the accident and, before reversing, he said that he had alighted from the lorry and looked down the road. Finding him guilty of careless driving, a metropolitan magistrate said that in the circumstances the defendant should have asked a bystander to keep a look-out for him whilst he was reversing.

Duty of driver when "driving along"

There is no rule of law or principle of good driving to the effect that the driver of a vehicle must be able to pull up within the limits of his vision.[13] A metropolitan magistrate has held that a driver who was seen to have a newspaper stretched across the steering wheel whilst the vehicle was in motion was guilty of careless driving, even though the vehicle was driven at a slow speed for a very short distance, and no person was, in fact, put in danger.[14] The point in this case was that, although the vehicle appeared to have been driven normally, the driver could not have had proper control over what he was doing. Another metropolitan magistrate has held that it is no defence for a driver summoned under section 12 to say that the incident complained of was due to his foot having slipped off the brake pedal on to the accelerator if it is shown that he knew that his brake pedal was glossy and worn. In such circumstances, the driver must, with the knowledge of the vehicle's condition, take extra care to prevent dangerous results.[15] A skid of itself is not evidence of careless driving, but the question to be asked is: "Was the skid a result of the negligent handling of the vehicle by the defendant?" Dealing with a civil case, where a heavy lorry had skidded on an icy road, Lord Greene M.R. spoke of the duty of a driver when driving his vehicle along treacherous roads in the following terms: "If roads are in such a condition that a motor-car cannot safely proceed at all, it is the duty of the driver to stop. If the roads are in such a condition that it is not safe to go at more than a footpace, his duty is to proceed at a footpace."[16] A motorist should, therefore, adjust his speed and manner of driving to the prevailing road conditions.

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[10] [1958] Crim.L.R. 817.

[11] *Croston* v. *Vaughan* [1937] 4 All E.R. 249; 102 J.P. 11.

[12] *Randall* v. *Tarrant* [1955] 1 All E.R. 600 (a civil case).

[13] *Morris* v. *Luton Corporation* [1946] 1 All E.R. 1; 101 J.P. 102 (a civil case).

[14] (1954) 18 Journ.Crim.Law 204.

Traffic lights, traffic signs and pedestrian crossings, etc.

A driver who is approaching a crossing controlled by traffic lights is entitled to assume that there is no traffic entering the crossing against the lights. He therefore owes no duty to any traffic which, in fact, enters the crossing against the lights, except that, if he sees such traffic, he ought then to take all reasonable steps to avoid a collision.[17] An authorised "Halt" sign means that the driver must bring his vehicle momentarily to a standstill.[18] In such a case, the vehicle must be brought to a standstill not at the "Halt" sign itself, but at the junction of the minor road with the major road.[19] In *Buffel* v. *Cardox* (*Great Britain*), *Ltd.*[20] the duty of a driver when approaching a road junction which was preceded by a "Slow" sign was discussed, and Singleton L.J. said: "I think the fairest way to look on it is that the sign is an indication to the motorist that he is approaching a place of potential danger—his speed ought to be such that he can pull up fairly quickly if someone or something appears from one or other of the cross-roads." Where there is a cross-roads collision between two vehicles, one of which has been driven on the major road, then the police invariably prosecute the person who has entered the junction from the minor road, since he is under a duty to give precedence to vehicles travelling on the major road. However, it is suggested at 122 J.P.N. 566 that in such circumstances, where there is a fair amount of traffic on the major road, the person driving on this road is under a duty to show *reasonable consideration* for the driver on the minor road, and that he should not ignore his existence and make it difficult for him to emerge from the minor road in safety. It is the duty of a motorist approaching an uncontrolled pedestrian crossing to drive in such a way that he can stop his vehicle before the crossing, if anyone is on the crossing, and if he fails in this duty then he will at least be guilty of failing to give precedence to a foot passenger on such a crossing contrary to regulation 4 of the Pedestrian Crossing Regulations, 1954. However, the fact that he has failed to accord such precedence will not *necessarily* involve him in an offence under section 12.[21] In *Evans* v. *Cross*[22] a person drove his car on the offside of a white line round a bend of the road. The nearside wheels of his car ran along the white line continuously round the corner, whilst he was overtaking a vehicle on his nearside travelling in the same direction. There does not appear to have been any traffic coming in the opposite direction. Whilst the Divisional Court held that the white line was not a " traffic sign " or " device," and that the driver was not therefore guilty of an offence under section 49 of the Road Traffic Act, 1930, it was pointed out that in such circumstances the driver would be liable to prosecution for careless or dangerous driving.

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[15] (1956) 20 Journ.Crim.Law 106.

[16] *Laurie* v. *Raglan Building Co., Ltd.* [1941] 3 All E.R. 332.

[17] *Joseph Eva, Ltd.* v. *Reeves* [1938] 2 All E.R. 115; 102 J.P. 261 (a civil case).

[18] *Tolhurst* v. *Webster* [1936] 3 All E.R. 1020; 101 J.P. 121.

[19] *Brooks* v. *Jefferies* [1936] 3 All E.R. 232.

[20] [1950] 2 All E.R. 878; 114 J.P. 564 (a civil case).

[*To be continued.*]

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[21] *Gibbons* v. *Kahl* [1955] 3 All E.R. 345.
[22] [1938] 1 All E.R. 751; 102 J.P. 127.

The Age of Criminal Responsibility

By T. E. JAMES, M.A., B.C.L., PH.D.(LOND.)
Barrister-at-Law, Reader in Law, University of London

The Ingleby Committee was set up as a Departmental Committee[1] to consider, *inter alia*, the working of juvenile courts, and, though as yet there has been no Report issued, much evidence has been submitted by local authorities, voluntary bodies and individuals. Invariably this evidence makes reference to the age of criminal responsibility. It was in 1933 that the age below which, at common law, a child was "conclusively presumed" incapable of committing a crime was raised from seven to eight.[2] In the course of considering the evidence in support of raising the age, it became apparent that difficulties had been encountered in basing any such recommendations on sound reason. With these facts in mind, it seemed that some investigation into the ground for fixing any particular age for capacity, including the age of majority, would be rewarding. This article is the result of such an investigation.

There is some reason for the ultimate choice of twenty-one as the age of majority, depending on the ancient rules of tenure; but the random fixing of ages bestowing capacities, without regard for any specific test, is probably more common today than is generally assumed. Good examples are provided by legislation for the protection of children, such as the penalty imposed on any person giving intoxicating liquor to a child under five years of age, unless it be for medicinal purposes.[3] Another example is the fixing of sixteen to twenty-one years of age for borstal detention.[4] According to Sir Evelyn Ruggles-Brice, formerly Chairman of the Prison Commission, who in effect introduced the borstal system into England, the age of sixteen was urged by the body of reformers who eventually obtained the passing of the Reform of Youthful Offenders Act, 1954. They established the principle that the young offender, at least up to that age, should be dealt with otherwise than by prison or transportation. The selection of the age of sixteen, which for so many years was consecrated as the age at which criminal youth ends and criminal majority begins, was "adopted at that time by universal consent for no other reason, so far as I can gather, than that it was the age of 'criminal majority' in the French Penal Code, and it has become notorious owing to the success of the French Colony at Mettrai established in the 'thirties'."[5] The age of sixteen thus became crystallised as the age of criminal majority in this country. On the other hand, the age below which a youthful offender may not be sentenced to imprisonment has evolved with reference to different tests. A child, that is below fourteen years of age, could not be ordered to be imprisoned, and a young person, between fourteen and seventeen years, could only exceptionally be so dealt with.[6] Now fifteen is the age below which no sentence of imprisonment may be imposed by any court,[7] though twenty-one is in general the age below which such a sentence should not be passed, unless there are exceptional circumstances.[8] The consequence is that a young ruffian of fifteen, not old enough for borstal and too unruly for any other place, must be sent to prison.[9]

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[1] 544 H.C. Deb., Vol. 554, col. 1618 (June 21, 1956).

[2] Children and Young Persons Act, 1933, s. 50.

[3] Children and Young Persons Act, 1933, s. 5.

[4] Criminal Justice Act, 1948, s. 20.

Modern developments

The age below which a child cannot be shown to have a criminal intent must depend upon factors other than the criminal law. For the criminal law merely reflects the general opinion of society as to the age when a person has sufficiently matured, so as to be held responsible for his acts. For this purpose, the age at which responsibility for criminal offences will be considered to have been reached will depend upon maturity for educational and civil purposes. The spate of legislation for the protection of children, which can be said to have begun a little over a century ago, has resulted in a choice of various ages. These turned, at least to some extent, upon the ability of the child to work in industry or elsewhere,[10] though other factors have played a part.

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[5] Ruggles-Brice, *The English Penal System*, 1921, pp. 89–90.

[6] Children and Young Persons Act, 1933, s. 52 (1) and (3), now repealed.

[7] Criminal Justice Act, 1948, s. 17 (1). A magistrates' court may not impose a sentence of imprisonment on any person under seventeen: Magistrates' Courts Act, 1952, s. 107 (2).

[8] Criminal Justice Act, 1948, s. 17 (2), and Magistrates' Courts Act, 1952, s. 107 (3).

[9] See Sir Gerald Dodson, the Recorder at the Central Criminal Court, in *R.* v. *Piper*, *The Times*, July 14, 1948. The maximum age of twenty-one for corrective training has likewise been criticised by Lord Goddard C.J.: see the *Journal of the Society of the Public Teachers of Law*, 1952, pp. 2–3.

[10] See, for example, the Report of the Cross Commissioners, appointed to inquire into the Elementary Education Acts, 1888, H.M.S.O., C. 5485, pp. 56–87 *et seq.*: in its reference to the Newcastle Commission, 1858, which reported in 1861. The latter Commission took the view that, owing

The Factory Act, 1833, excluded children under nine from textile mills, and limited the hours of work for those between nine and thirteen years. Under the Education Act, 1870, school-boards were empowered to make by-laws fixing the beginning of compulsory attendance at school at five years, the age at which it has remained ever since, despite occasional suggestions at times of financial strain to raise the age to six years. Under these by-laws, a child could be made to continue his school attendance up to the age of thirteen, but exemptions could be easily obtained.

The age limit for leaving school was gradually raised until it was fixed at fourteen in 1918.[11] Finally, the Education Act, 1944, fixed the lowest school age at five years and the upper limit was raised to fifteen years.[12] But these ages are by no means stabilised yet, for the Act provides that the education authorities should " have regard to the need for securing that provision is made for pupils who have not attained the age of five years by the establishment of nursery schools or classes "; also, it is provided, the age may be raised to sixteen by Order in Council when the Minister deems it desirable.

In respect of university entrants, there is very little available evidence of the average age of the university student entering the medieval university. The same may be said of English universities, up to 1919, though isolated cases are mentioned, such as Lord Westbury, who entered Wadham, Oxford, at the age of fourteen, in spite of the Warden's objection that " they did not receive children." [13] It is quite apparent from the Annual Reports issued since 1919 by the University Grants Committees, which publish statistics, that by far the majority of students entering universities since that date have been nineteen years of age or over.[14]

The many reasons given for the selection of a specific age under the Education Act today can be summed up simply: modern industry and commerce are not a fit place for the modern child of

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to demands of employment, children could not normally be expected at that time to stay at school after eleven and therefore it was important to concentrate upon the education of infants and young children.

[11] The Acts of 1876 and 1880 mention 10 and 13 as the ages for leaving school, depending on the circumstances. The Acts of 1893, 1899 and 1900 gradually established a rising minimum below which there could be no exemptions.

[12] Education Act, 1944, ss. 9 and 35. A child is defined in this Act as a person who is not over compulsory school age.

[13] H. Raschdall, *The Rise of the Universities,* 1936, vol. 1, p. 125. Likewise, Philpott, afterwards Bishop of Exeter, entered Corpus at thirteen during this generation.

[14] Since 1949, those under seventeen years have not been admitted and this fact, together with the introduction of conscription, would tend to increase the later age group. No reports were published between 1939 and 1947.

fourteen, who has probably had a more sheltered life than his prototype of eighty years ago. Further, children require education to arm themselves against the deadening effect of a machine age and, to be able to employ their leisure as workers, they must be interested in the world about them and be spiritually self-contained.[15]

This expression of opinion can be supported by the practical fact that the age at which a child is self-supporting or even able to contribute to the household expenses in any noticeable degree is becoming increasingly higher. This cannot, today at least, be entirely due to the smallness of the earnings which a child or young person would get; young persons are certainly in a position to bring in quite a large wage packet. It follows from what has already been indicated that social pressures, during the nineteenth and twentieth centuries, have been applied through the legislature to produce the postponement of adult responsibilities; the Education Acts are an index of the success of these pressures.

Other factors, apart from the ability of the child to work in industry or elsewhere, may be considered in relation to legislation respecting juvenile offenders and the prevention of cruelty to children.

In 1847, by the Juvenile Offenders Act, fourteen was the age selected for offenders committing certain indictable offences. The magistrates were empowered to try these cases summarily and were given a certain discretion in respect of the punishment to be inflicted. The Summary Jurisdiction Act, 1879, introduced the distinction between a "child" and a "young person," the former being under twelve years of age and the latter over twelve and under sixteen years,[16] thereby increasing the jurisdiction of the magistrates under the 1847 Act to juveniles under sixteen. The Children Act, 1908, raised the age of a "child" to fourteen: but it was not till 1933 that the upper age of a "young person" was increased to seventeen years of age.[17]

In relation to the prevention of cruelty to children, the legislature in 1889[18] protected girls under sixteen and boys under fourteen. The age for boys was raised to sixteen in 1894[19] and this is the age today, below which protection is afforded to any juvenile who is wilfully neglected or maltreated.[20]

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[15] G. A. N. Lowndes, *The Silent Social Revolution*, 1937, p. 183, which is one of many authorities for this widely accepted view today.

[16] s. 49. This Act repealed the Act of 1847.

[17] Children and Young Persons Act, 1933, s. 107.

[18] Prevention of Cruelty to Children Act, 1889, s. 1.

[19] Prevention of Cruelty to Children (Am.) Act, 1894, s. 1, which was repealed and re-enacted in this respect by the Prevention of Cruelty to Children Act, 1894.

The attainment of fourteen years of age, before which a juvenile is legally a " child " under the Children and Young Persons Act, 1933, seems to be popular in criminal legislation. The choice of this age may have been influenced by the age of puberty for males in Roman law, though probably it was based on the conception of the maturity of juveniles in the mid-nineteenth century. Certainly, in modern legislation, such as the Criminal Justice Act, 1948, fourteen is taken as a crucial age, for by section 27 juveniles awaiting trial and not released on bail are to be committed to a Remand Home if under fourteen. It is true that those between fourteen and seventeen are to be likewise dealt with, unless there are exceptional circumstances; but in practice these two groups are invariably treated separately on remand. The object of this legislation, which was implementing ideas embodied in previous statutes, was the product of the nineteenth-century reforming movement, which aimed at keeping juveniles out of prison when they had committed offences. It might have been thought, therefore, that the age below which no sentence of imprisonment was permitted would coincide; but in fact, fifteen is the age below which a juvenile may not be sent to prison.[21] In a recent international discussion on the prevention and treatment of crime it has been recommended that: " States should fix a uniform age of minority (which should in no case be less than fourteen) for the purposes of criminal law below which a minor would not be capable of incurring liability." [22]

There is a tendency to regard eighteen as an age for emancipation today, for example, the National Service Act, 1948, took this age as rendering a male liable to military service. Again, the Report on Widows' Benefits [23] recommends eighteen to be the upper age limit for family allowance and national insurance benefits. Likewise, the Children Act, 1948, defines a child, for the purpose of that statute, as under that age.[24] In relation to criminal proceedings it was considered, at the first United Nations

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[20] Children and Young Persons Act, 1933, s. 1.

[21] Criminal Justice Act, 1948, s. 17.

[22] The Latin-American Seminar on the Prevention of Crime and Treatment of Offenders, Rio de Janeiro, 1953, ST/T.A.A./Ser.C./13, p. 72.

[23] Cmd. 9654, 1956.

[24] This statute did to some extent unify various previously existing provisions which were anomalous, for example, the Public Assistance Act, 1930, defined a child as a person when sixteen; the War Orphans Act, 1942, empowered the Minister to provide until the attainment of the age of twenty-one for the care of a child pensioned by him. See, on this question, the Report of the Care of Children Committee, 1946, Cmd. 6922, p. 5.

Congress on the Prevention of Crime and the Treatment of Offenders, that "It is desirable that the full age for the purposes of penal law in European countries should not be fixed below eighteen." [25]

Summary: The fact that the age of seven was selected as the test of *infantia* in Roman law probably accounts for the common law rule that persons under seven years of age are presumed to be incapable of committing a crime.[26] The use of the word infancy as applying to those under seven was not retained in English law, except for a time in the Probate, Divorce and Admiralty Division of the High Court. Thus, a distinction was drawn between infants, under seven, and minors, over seven and under twenty-one, in the case of the appointment of a guardian to take out administration *durante minore aetate*.[27]

The age of majority and capacity

The modern tendency, in fixing specific ages for capacity, seems to be moving in the direction of the school-leaving age or ages fixed by the various Education Acts. This statement is to some extent borne out by legislation on the restriction of the employment of children, for example, the general provision in the Children and Young Persons Act, 1933, which refers to the compulsory school age as a yardstick.[28]

This educational test would no longer depend on the capacity of the child to earn a living, or at least enough to support itself in the home, since the legislation has intervened to prevent child labour or employment in many fields. A glance at the Children and Young Persons Act, 1933, Part II, ss. 18 to 25, will provide examples. Amongst these, the power conferred for making by-laws as to the employment of children,[29] under fourteen, and of persons under eighteen,[30] other than children, is particularly striking. The latter provision has never been brought into force; but these young persons are controlled as to the hours they work in certain employments by, for example, the Young Persons (Employment) Act, 1938.

In criminal law, age has played a part in raising presumptions affecting ability to form criminal intent. This must depend to some extent on maturity and thus, from the point of view of guilt and punishment in criminal proceedings, the age would seem to depend on similar reasoning to that employed in deciding upon maturity for educational and civil purposes.

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[25] *U.N. International Review of Criminal Policy*, No. 7, 1955, p. 11.

[26] The age was raised to eight by the Children and Young Persons Act, 1933, s. 50.

[27] See Probate Rules (Non-Contentious), 1862–1925, rr. 33, 34 and 35; see also *Rich* v. *Chamberlayne* (1752) 1 Lee 134, where the boy was ten years of age and chose his guardian.

[28] s. 18 (1) (*a*), which has been amended by the Education (Misc. Provisions) Act, 1948.

[29] s. 18.

[30] s. 19.

Some Illustrations of the Application and Meaning of "Unlawful" in Criminal Law

By E. Y. EXSHAW, M.A., LL.B., *Barrister-at-Law*
Reid Professor of Laws, Trinity College, Dublin

The recent decision of the Court of Criminal Appeal in *R.* v. *Chapman*[1] as to the meaning of "unlawful" in section 19 (1) of the Sexual Offences Act, 1956,[2] provides much food for thought.

It is commonly provided by statute that the doing of an act described therein as "unlawful," or alternatively, "unlawfully" doing some act, constitutes an offence. The same word occurs in the definition of some common law offences. Two questions generally arise in such cases. First, what meaning, if any, is to be attributed to these words; and secondly, does their inclusion in the definition add anything to it?

"Unlawful" in civil cases

The answer to the first question is rendered more complex by reason of the fact that as far as civil law is concerned the word "unlawful" is used in two senses. Thus Halsbury L.C. in the *Mogul S. S. Co.* v. *McGregor, Gow, and Co.*[3] said: "There are two senses in which the word 'unlawful' is not uncommonly, though, I think, somewhat inaccurately, used. There are some contracts to which the law will not give effect; and therefore although the parties may enter into what, but for the element the law condemns, would be perfect contracts, the law would not allow them to operate as contracts, notwithstanding that, in point of form, the parties have agreed. Some such contracts may be void on the ground of immorality; some on the ground that they are contrary to public policy; as, for example, in restraint of trade; and contracts so tainted the law will not lend its aid to enforce. It treats them as if they had not been made at all. But the more accurate use of the word 'unlawful,' . . . namely, as contrary to law, is not applicable to such contracts." Despite His Lordship's criticism of the use of the word "unlawful" in the former general sense, its use in this sense has continued although most of the authorities use the word "illegal" in an equivalent sense.[4]

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[1] [1958] 3 All E.R. 143.

[2] 4 & 5 Eliz. 2, c. 69.

[3] [1892] A.C. 25, at p. 39.

The criminal law

An attempt to apply this civil law usage to the criminal law can be seen in the Australian case of *Lyons* v. *Smart*,[5] where Griffiths C.J. said: "The word 'unlawfully' is a word commonly used in statutes creating crimes, misdemeanours, and minor offences, and in such Acts it is used in two shades of meaning: one when referring to an act which is wrong or wicked in itself—recognised by everybody as wicked—as, for instance, when it is used with reference to certain sexual offences or with reference to acts which are absolutely prohibited under all circumstances; the other when referring to some prohibition of positive law." This dictum in itself seems to confuse the "two shades of meaning," and in any event is of such a general nature that it is of no practical value.

It seems quite clear that in the case of the criminal law no general definition can be given to either the word "unlawful" or "unlawfully." That this is true can be seen from an examination of the definitions of some of the better-known crimes in which either of these words occurs.

Unlawful assembly

The most simple case is that of unlawful assembly. Here the word "unlawful" is an integral part of the definition of the offence. An assembly *per se* is not an offence, so that the epithet "unlawful" imports at least that the circumstances under which the persons are assembled are such that "according to the opinion of rational and firm men, [they] are likely to produce danger to the tranquillity and peace of the neighbourhood."[6] Thus "unlawful" (read in conjunction with "assembly") must be interpreted so narrowly that its meaning is solely applicable to the particular circumstances of this offence.

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[4] *Bennett* v. *Bennett* [1952] 1 All E.R. 413, at p. 421, *per* Denning L.J.
[5] (1908) 6 C.L.R. 143, at p. 147.
[6] *R.* v. *Vincent*, 9 C. & P. 91; 3 St.Tr.(N.S.) 1037, *per* Alderson B.

Unlawful oaths

In the case of unlawful oaths, although the Unlawful Oaths Act, 1797,[7] was mainly directed against combinations for purposes of mutiny and sedition, it has been held that an oath administered in contemplation of a mere civil trespass fell within the statute on the ground that such an association was unlawful.[8] Thus, in effect, oaths of secrecy are "unlawful" whether administered in contemplation of a criminal act or of a civil wrong.

Unlawful drilling

On the other hand when one speaks of unlawful drilling, one means the drilling of persons to the use of arms without authority from Her Majesty or a Secretary of State or other officer deputed by him to grant it.[9] Here "unlawful" imports an absence of express authorisation by the authority empowered by law to grant it.

Murder

Again, murder consists in "unlawfully killing a reasonable person who is in being and under the Queen's peace, the death following within a year and a day."[10] In this case also, the law contemplates killings that are not expressly or impliedly authorised by law. If, however, the killing is either authorised or permitted by the law, the killer enjoys immunity. Such is the case of the hangman who carries out the sentence of a competent court,[11] or the soldier killing in the actual course of an operation of war.[12]

Wounding

However, in the case of the felony of "unlawfully and maliciously wounding"[13] it would appear that the word "unlawfully" is mere surplusage. Provided the wounding is malicious it is very difficult to see how it could be lawful since the consent of the victim could be no defence to such an assault.[14] Even in the case of a surgical operation, the consent of the patient would be vitiated if the surgeon acted maliciously with the deliberate intention of inflicting an injury, and such consent would afford no justification for the surgeon's act.

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[7] 37 Geo. 3, c. 123.

[8] *R.* v. *Brodribb*, 6 C. & P. 571.

[9] Unlawful Drilling Act, 1820 (60 Geo. 3 & 1 Geo. 4, c. 1), s. 1, as amended by the Firearms Act, 1920 (10 & 11 Geo. 5, c. 43), s. 16.

[10] Co. 3 Inst. 47.

[11] 4 Bl.Comm. 180.

[12] 1 Hale P.C. 433.

[13] 24 & 25 Vict. c. 100, s. 18.

[14] *R.* v. *Coney* (1882) 8 Q.B.D. 534.

Abortion

Much doubt was caused, especially amongst the medical profession, by the use of the word "unlawfully" in section 58 of the Offences against the Person Act, 1861,[15] in connection with the offence of procuring or attempting to procure the miscarriage of a woman. Logically its inclusion in the definition of the offence would have implied that in certain circumstances such an operation might be lawful. No exceptions or defences were however set out in the section, and there was no authority in the previous case law from which an exception, say in the case of therapeutic abortion, could be inferred. The doubts were still unresolved at the time of the passing of the Infant Life (Preservation) Act, 1929,[16] which statute specifically provided that in the case of a charge of child destruction no person could be convicted unless it was proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother.

It might have been thought that this Act would have amended section 58 of the 1861 Act by inserting a similar provision applicable to it. As it did not do so, an indirect approach had to be made by way of judicial legislation. This was brought about by the famous direction to the jury of Macnaghten J. in *R.* v. *Bourne*.[17] Before looking at His Lordship's direction it is of some interest to note that the indictment did not allege that the accused, an eminent obstetrical surgeon, had used the instrument "unlawfully"; and, before plea, counsel for the defence objected that by reason of the omission of that word the indictment was bad in that it did not charge any offence known to the law. The trial judge then ruled that in order to constitute an offence under section 58 of the 1861 Act it would be necessary for the Crown to prove that the accused had unlawfully used an instrument with intent to procure a miscarriage, and that, therefore, the objection was valid. He accordingly directed that the indictment should be amended by the insertion of the word "unlawfully" before the words "used an instrument."[18]

In the course of His Lordship's direction to the jury he said: "In my opinion the word 'unlawfully' is not, in that section

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[15] 24 & 25 Vict. c. 100.

[16] 19 & 20 Geo. 5, c. 34.

[17] [1939] 1 K.B. 687; [1938] 3 All E.R. 615.

[18] [1939] 1 K.B. at pp. 687 and 688.

[section 58 of the 1861 Act], a meaningless word. I think it imports the meaning expressed by the proviso in section 1, subsection (1), of the Infant Life (Preservation) Act, 1929, and that section 58 of the Offences against the Person Act, 1861, must be read as if the words making it an offence to use an instrument with intent to procure a miscarriage were qualified by a similar proviso." [19]

On the basis of this interpretation of the meaning imported by the inclusion of the word " unlawfully," His Lordship directed the jury that the burden rested on the Crown of satisfying them beyond reasonable doubt that the accused did not procure the miscarriage of the girl in good faith for the purpose only of preserving her life.

The question arising from this part of the direction was what meaning was to be given to the words " for the purpose of preserving the life of the mother." On this point His Lordship expressed the view that these words ought to be construed in a reasonable sense, and that if the doctor was of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy would be to make the woman a physical or mental wreck, he would be operating for the purpose of preserving the life of the mother.[20]

This broadly indicates the extent of the exception that has been read into section 58 of the 1861 Act through the medium of the inclusion in it of the word " unlawfully." It is not the purpose of the above analysis to extract the legal principle on which the case is based but merely to illustrate the use which has been made of the mystical word " unlawfully " in this instance. However, it may be mentioned that Dr. Glanville Williams is of opinion that the only legal principle on which an exception to section 58 of the 1861 Act can properly be admitted is the defence of necessity.[21]

In short then, for more than seventy-five years it was uncertain to what extent, if any, the word " unlawfully " curtailed the scope of the section. Even today we do not know if the ultimate limit has been set to the creation of exceptions. It is within the bounds of possibility that this word may be seized upon by judges in the future to legalise abortion on eugenic grounds or in cases where the pregnancy has resulted from a rape and is unaccompanied by any danger to the life or health of the victim.

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[19] *Ibid.*, at p. 691.

[20] *Ibid.*, at p. 694.

[21] *The Sanctity of Life and the Criminal Law*, p. 152. See also [1958] Crim.L.R. 600 *et seq.*; and see " The Law of Abortion and Necessity " by D. Seaborne Davies in 2 *Modern Law Review*, 126.

Unlawful sexual intercourse

It is perhaps in the case of those offences in the definition of which reference is made to " unlawful carnal knowledge " that the greatest uncertainty exists. Although this expression was used at least as early as 1576,[22] it appears that the only English authority as to the meaning of " unlawful " in this connection is the recent decision of the Court of Criminal Appeal in *R.* v. *Chapman.*[23] The Sexual Offences Act, 1956,[24] on which this decision is based, actually uses the expression " unlawful sexual intercourse " where the older statutes speak of " unlawful carnal knowledge," but by virtue of section 44 of this Act the connotation of the two expressions would appear to be identical. Section 44 provides that, where, on the trial of any offence under the Act, it is necessary to prove sexual intercourse, it shall not be necessary to prove the completion of the intercourse by the emission of seed, but the intercourse shall be deemed complete upon proof of penetration only.

In *R.* v. *Chapman* [23] the court was most careful to limit its definition of unlawful sexual intercourse to a definition of unlawful sexual intercourse for the purposes of section 19 of the 1956 Act, under which section the case arose. Section 19 makes it an offence (subject to the exception contained in the second subsection) for a person " to take an unmarried girl under the age of eighteen out of the possession of her parent or guardian against his will, if she is so taken with the intention that she shall have unlawful sexual intercourse with men or with a particular man."

Donovan J., delivering the judgment of the court, said: " . . . the word ' unlawful ' in section 19 is either surplusage or means ' illicit.' We do not think it is surplusage, because otherwise a man who took such a girl out of her parents' possession against their will with the honest and bona fide intention of marrying her might have no defence, even if he carried out that intention. In our view the word simply means ' illicit,' *i.e.*, outside the bond of marriage." [25]

Two alternative interpretations of the word " unlawful " had been suggested on behalf of the appellant. First, that it connoted intercourse which was forbidden by law; and since the girl was over sixteen in this case, it was not so forbidden, however immoral it was. Secondly, and alternatively, that its effect was that the section only applied if the girl was taken away for intercourse in circumstances such as would constitute the breach of a covenant in a lease not to create a nuisance; for example, to a house used as a brothel. These suggested interpretations were therefore rejected.

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[22] 18 Eliz. 1, c. 7, s. 4.

[23] [1958] 3 All E.R. 143.

[24] 4 & 5 Eliz. 2, c. 69.

[25] [1958] 3 All E.R. at p. 145.

The question arising out of this decision in *R.* v. *Chapman* is whether the law regards all extra-marital sexual intercourse as being "unlawful." This case does not answer that question nor does it purport to do so. All that can be said is that there are three other authorities, one Scottish and two Irish, in which a similar interpretation was put upon the word "unlawful" for the purposes of specific sections of different statutes dealing with sexual offences.

The Scottish case is *H. M. Advocate* v. *Watson.*[26] It illustrates the obvious reluctance with which the trial judge found himself obliged to regard unlawful carnal knowledge as being equivalent to extra-marital carnal knowledge for the purposes of section 5 (1) of the Criminal Law Amendment Act, 1885,[27] then only recently passed.

In his charge to the jury Lord Craighill, the trial judge, said: "The difficulty arises from the use of the word 'unlawful,' of which the statute gives no definition. What one would at first infer is that unlawful carnal knowledge—knowledge of a female between the ages here specified—is carnal knowledge against the will of the woman. But what is said by the prosecutor to be the true interpretation ignores consent altogether. There cannot be a rape if there be consent; there may, however, as the prosecutor contends, be an offence under the portion of the Act referred to, even where consent has been given. This I feel to be a strange and anomalous conclusion, for hitherto in Scotland a female over twelve years of age has been mistress of her person; but nevertheless such is my reading of the clause, and, so far as I can see, it is the only one which, having in view all the provisions in which the word 'unlawful' occurs, can reasonably be adopted. Whether this innovation be an improvement many probably may be disposed to doubt; but we must take things as they are. The Act is said to have been passed in a panic; but be this as it may, legislation passed in a panic is still legislation, and judges and juries alike must aid in its administration. You will therefore understand, taking the law on the subject from me, that unlawful carnal knowledge is neither more nor less, where the woman is over thirteen and under sixteen years of age, than carnal knowledge by one who is not her husband." [28]

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[26] 1885, 13 S.C.(J.) 6.

[27] 48 & 49 Vict. c. 69.

It will be noticed that, in this case also, the judge was most careful to confine his remarks on the meaning of unlawful carnal knowledge to its meaning for the purposes of the relevant section. It might have been thought that as a result of His Lordship drawing attention to the obvious difficulty arising from the use of the word "unlawful" in this connection, future parliamentary draftsmen would have obviated this difficulty by including an interpretative section in Bills dealing with sexual offences.

The first Irish case, *The People* v. *McCormack*,[29] was a decision of the Court of Criminal Appeal in 1943 on section 7 of the Criminal Law Amendment Act, 1885,[30] as amended by section 20 of the Criminal Law Amendment Act, 1935.[31] By virtue of the amendment the offence consisted in taking or causing to be taken any unmarried girl under the age of eighteen years out of the possession and against the will of her father or mother or any person having the lawful care or charge of her, with intent that she should be unlawfully and carnally known by any man, whether such carnal knowledge was intended to be with any particular man or generally.

The decision, as far as it dealt with the meaning of "unlawful" carnal knowledge, was not very helpful. It had been submitted on behalf of the appellant that the intent to have unlawful carnal knowledge contemplated by the section was necessarily an intent to rape. The point having been overstated in this way, the court had no difficulty in rejecting the submission on the ground that section 9 of the 1885 Act, which speaks of rape "or of any offence made felony by section 4" (unlawful carnal knowledge of a girl under the age of thirteen), indicated an offence which was not necessarily rape.

The other Irish case, *Att.-Gen.* v. *Ryan*,[32] came before the Supreme Court by way of case stated from the Circuit Criminal Court. The accused had been convicted in the District Court of an offence under section 2 (2) of the Criminal Law Amendment Act, 1935,[33] which provided that any person who attempted to have unlawful carnal knowledge of any girl who was of or over the age of fifteen years and under the age of seventeen years should be guilty of a misdemeanour. From this conviction the accused appealed to the Circuit Criminal Court. One of the questions submitted by the Circuit Court judge for the opinion of the Supreme Court was whether the attempt by the accused to have carnal knowledge of the girl was unlawful.

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[28] 1885, 13 S.C.(J) at p. 9.

[29] (1957) 91 I.L.T.R. 167 (included at the end of the report of *Att.-Gen.* v. *Ryan* (1957) 91 I.L.T.R. 164).

[30] 48 & 49 Vict. c. 69.

[31] No. 6 of 1935.

[32] (1957) 91 I.L.T.R. 164.

[33] No. 6 of 1935.

Section 2 of the Irish Act of 1935 corresponded to section 5 (1) of the Criminal Law Amendment Act, 1885,[34] but whereas an offence under the latter section could only be committed where the girl was between the ages of thirteen and sixteen, the relevant ages in the case of the former were raised to fifteen and seventeen, respectively.

It was contended on behalf of the appellant that in the case of a girl over fifteen years of age the unlawful nature of the attempted act was removed by her consent. This because section 14 of the 1935 Act provided that it should not be a defence to a charge of indecent assault upon a person under the age of fifteen years to prove that that person consented to the act, and so it was implied that consent was a defence where the alleged victim of an indecent assault was over the age of fifteen years. By analogy, therefore, an attempt to have carnal knowledge of a girl over fifteen years of age who consented was not unlawful.

Maguire C.J., delivering the judgment of the Supreme Court, rejected this argument and stated that a reasonable definition of the offence with which the appellant stood charged was attempting to have carnal knowledge of a female between the age of fifteen and seventeen years, both parties being at the time of the attempt unmarried.[35] It is presumably merely being facetious to remark that His Lordship, by the concluding phrase of this definition, meant: both parties being at the time of the attempt unmarried to one another.

In short then, these four cases afford illustrations of the word "unlawful" used in conjunction with carnal knowledge or sexual intercourse being interpreted as being equivalent to extra-marital carnal knowledge for the purposes of the different sections of the statutes concerned. Indeed in most cases such a construction is necessary if any offence of this nature is to exist under these statutes.

This is particularly true in the case of those statutes which raise the age under which an offence can be committed upon the female party. The Irish Act of 1935[36] is a case in point. Prior to 1935 no offence would have been committed where a person simply had extra-marital intercourse with a girl aged between sixteen and seventeen years. Since section 2 of the 1935 Act declared that any person who unlawfully and carnally knows or attempts to have unlawful carnal knowledge of a girl between the ages of fifteen and seventeen is guilty of a misdemeanour, the interpretation of the word "unlawfully" or "unlawful" becomes all-important where the girl is over sixteen but under seventeen years of age. If "unlawful" simply meant "outside the bond of matrimony," the offence would have been committed in every case where the parties were not man and wife and the girl was between the ages of fifteen and seventeen. If, however, "unlawful carnal knowledge" connoted intercourse forbidden by law, no offence would have been committed where the girl was between the ages of sixteen and seventeen and her consent to the act had been full and free. This because the wording of the section would only cover intercourse previously forbidden by law.

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[34] 48 & 49 Vict. c. 69.

[35] (1957) 91 I.L.T.R. at p. 167.

[36] No. 6 of 1935.

On this interpretation of the word "unlawful" the same argument could be applied to the earlier statutes. Section 5 (1) of the Criminal Law Amendment Act, 1885,[37] raised the age at which a female was deemed to be mistress of her person from thirteen to sixteen. It had stood at the former age since 1875.[38] Thus after 1885 it could have been argued that an accused who had carnally known a girl between the ages of thirteen and sixteen was not guilty of an offence under section 5 (1) of the 1885 Act since such intercourse was not forbidden by law before 1885 and so was not "unlawful" within the meaning of the section. Prior to 1885 simple carnal knowledge of a consenting female was only an offence where the girl was under twelve years of age.[39]

By such a process one would be thrown back from statute to statute seeking the minimum age of a female under which, either by statute or at common law, intercourse with her was forbidden. Only when this minimum age was reached could it be said that an offence would be committed where a statute provided a penalty for unlawful carnal knowledge of a female under that age. Statutes providing penalties for unlawful carnal knowledge of a female over that age would be nugatory unless they specifically provided that such carnal knowledge should be unlawful if it occurred outside the bond of matrimony.

The earliest statute in which the expression "unlawfully and carnally know" was used, appears to be 18 Eliz. 1, c. 7. Section 4 of this Act provided that: ". . . for plain Declaration of Law, be it enacted, That if any Person shall unlawfully and carnally know and abuse any Woman Child under the Age of Ten Years, every such unlawful and carnal Knowledge shall be Felony . . ." An Act of 1557,[40] which deals with the abduction of heiresses, uses the expression " deflower " where the later statutes speak of " unlawfully and carnally know." The origin of the latter statutory description would then appear to date from the latter half of the sixteenth century.

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[37] 48 & 49 Vict. c. 69.

[38] 38 & 39 Vict. c. 94, s. 4.

[39] 24 & 25 Vict. c. 100, s. 51.

The wording of 18 Eliz. 1, c. 7, s. 4, would give rise to the inference that prior to its enactment the law on the subject was not clear. Most of the earlier statutes speak only of rape although the Statute of Westminster I, c. 13,[41] deals with the ravishing of " any maiden within age either by her own consent or without." A girl under the age of twelve years was " within age." [42] Under this statute the offence was reduced to a trespass if not prosecuted by appeal within forty days, the offender only being liable to a sentence of two years' imprisonment and a fine at the King's will. However, ten years later the offence of forcible rape was made a felony by the Statute of Westminster II.[43]

Sir Mathew Hale was of opinion that carnal knowledge of a female under twelve years of age—the age of female discretion at common law—either with or without her consent amounted to rape and felony both before and after 18 Eliz. 1, c. 7.[44] Blackstone, however, points out that this latter statute was generally held only to extend to infants under ten years of age,[45] although those between the ages of ten and twelve were still protected by the Statute of Westminster I [46] since this had not been altered by either the Statute of Westminster II [47] or 18 Eliz. 1, c. 7.

At least, then, since 1285, the year of Westminster I, carnal knowledge of a female under twelve years of age may be said to have been " unlawful," if that word is used in the sense of being forbidden by law. It may have been because of this that 18 Eliz. 1, c. 7, uses the expression " unlawfully and carnally know," although this is not the view of the Court of Criminal Appeal in *R.* v. *Chapman*.[48] However, on this suggested interpretation of the word subsequent statutes raising the age above twelve and including the word " unlawful " or " unlawfully " would appear to be abortive for the reasons stated before. Since they have always been treated as being effective it is impossible from the practical viewpoint to contend that " unlawful " was used in this sense.

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[40] 4 & 5 Phil. & Mar. c. 8.

[41] 3 Edw. 1, c. 13.

[42] 4 Bl.Comm. 212.

[43] 13 Edw. 1, c. 34.

[44] 1 Hal.P.C. 631.

[45] 4 Bl.Comm. 212.

[46] 3 Edw. 1, c. 13.

[47] 13 Edw. 1, c. 34.

[48] [1958] 3 All E.R. at p. 144.

From the point of view of legal exactitude, however, this does not make the position any more satisfactory. It renders the application of the criminal law uncertain to some extent, and so gives rise to the type of appeal already mentioned. Such difficulties could have been avoided in some cases by the omission of the word "unlawful," and in other cases by the inclusion in the statute of an interpretative section. The latter would be necessary, for example, in the case of section 19 of the Sexual Offences Act, 1956,[49] because, as Donovan J. pointed out in *R.* v. *Chapman*,[50] if the word "unlawful" was surplusage (or was omitted) a man who married the girl might have no defence to a charge under the section.

The lack of precision with which the word "unlawfully" was used in the earlier statutes in relation to carnal knowledge was referred to by Donovan J. in the same case.[51] His Lordship attributed this to the fact that the framers of a statute in those days would have been more mindful of the canon law and so would have referred to any intercourse outside the bond of matrimony as "unlawful," and that their successors when drafting consolidating Acts simply repeated the word without a close consideration of its necessity or precise meaning. This reasoning undoubtedly assisted the court in reaching the decision which it did. The dictum, however, raises the much wider issue of whether all extra-marital intercourse must be regarded as "unlawful" in the wider sense of the term.

As has been pointed out all the authorities interpret the word "unlawful" in the wide sense solely with reference to the particular section of the statute which is being considered by the court in the individual case. Indeed, had the judges attempted to interpret it so as to cover all cases, their attempts would have been mere *obiter*.

It would seem reasonable to define "unlawful sexual intercourse" as including intercourse with females under the present statutory age; intercourse following upon an abduction; intercourse following upon procuration in any of the instances set out in sections 22 to 29 of the Sexual Offences Act, 1956 [52]; intercourse with female idiots, imbeciles or defectives; incestuous intercourse; unnatural intercourse; intercourse obtained by force, fraud, threats or intimidation; and adulterous intercourse.

On the other hand it would be contrary to common sense to regard sexual intercourse between fully consenting adults as being "unlawful" in any sense of the word merely on the ground that it was outside the bond of matrimony. It may be that the law of contract regards contracts made to facilitate such intercourse as "illegal."[53] Even in this case, however, a promise made under seal in consideration of past intercourse is enforceable.[54] Furthermore, there is a distinction between regarding the contract as illegal and the contemplated act as unlawful. It does not necessarily follow that because the contract is void the act must be regarded as unlawful; the fact that the act is immoral being a sufficient reason to justify a court refusing to be turned into an instrument for its enforcement. It is only by regarding the contract as illegal that the court can avoid being used as a means of aiding immorality. However, merely to regard extra-marital intercourse as not being unlawful does not involve the machinery of justice being used in any positive act of abetting such conduct. Quite apart from this there are many heads of immorality that the law of contract does not treat as being sufficiently contrary to public policy to warrant agreements entered into in furtherance of them being treated as void.

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[49] 4 & 5 Eliz. 2, c. 69.

[50] [1958] 3 All E.R. at p. 145.

[51] *Ibid.*, at p. 144.

[52] 4 & 5 Eliz. 2, c. 69.

This latter fact is simply an illustration of the obvious proposition that what is immoral is not necessarily unlawful. Even in the field of sexual morality a dictum of Wills J. in *R.* v. *Clarence*[55] supports the view that not all immorality in sexual relationships is unlawful. In the course of his judgment in that case, His Lordship said: "Whilst of opinion that it is not every breach of moral duty that will satisfy the term 'unlawfully,' I am clearly of opinion that an act which would give a right to a judicial separation is abundantly sufficient to answer to it."[56] Any attempt to treat all branches of sexual immorality as being unlawful is simply an attempt to resurrect the concepts of a theocratic and sacerdotal jurisprudence. Even before reaching its maturity the common law system, perhaps more than any other, differentiated between law and morals. It is hardly too much to suggest that today it has shaken itself completely free from the shackles of canon law in so far as the latter tended to identify law with morality.

Implications of the cases

Nor is this contention—that intercourse between unmarried and consenting adults should not be treated as unlawful—purely of academic importance. A contrary view could lead to unfortunate results in practice. The law of manslaughter provides an illustration. Although the proposition has been much criticised,[57] it is probable that in strict legal theory death caused in the course of doing any unlawful act will be at least manslaughter.[58] If, due to physical exertion involved in an act of extra-marital intercourse, one of the parties to it suffers a cardiac failure and dies, might not the other party be guilty of manslaughter?

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[53] *Pearce* v. *Brooks* (1866) L.R. 1 Exch. 213.

[54] *Nye* v. *Moseley* (1826) 6 B. & C. 133.

[55] (1888) 22 Q.B.D. 23.

[56] *Ibid.*, at p. 36.

[57] See J. A. C. Turner in *The Modern Approach to Criminal Law*, at pp. 214–215 and 224–230.

Again, a covenant in a lease will sometimes be found prohibiting the commission of unlawful acts on the premises. Such a covenant may be followed by a clause providing for the forfeiture of the lease in the event of a breach of any of the covenants contained in the lease. If all acts of extra-marital intercourse were to be regarded as unlawful, such a clause might frequently be invoked with success by lessors. The same view might also lead to the termination of certain tenancy agreements.

Likewise, section 4 of the Vagrancy Act, 1824,[59] which is penal, provided (*inter alia*) that " every person being found in or upon any dwelling-house, warehouse, coach-house, stable, or outhouse, or in any inclosed yard, garden, or area, for any unlawful purpose " should be deemed a rogue and vagabond within the true intent and meaning of the Act. A rigid enforcement of this section on the basis that extra-marital intercourse was unlawful might lead to very startling results not contemplated by the framers of the statute.

Actually, in *Hayes* v. *Stevenson*,[60] the Court of Queen's Bench quashed a conviction under section 4 where the appellant had been found in a private park for the purpose of fornication. From the headnote to this case one would gather that the court regarded fornication as not being an " unlawful purpose " within the meaning of the section. However, this headnote would appear to be supported in the judgment by inference only. Cockburn L.C.J., delivering the judgment of the court, held that the Act must mean that the party was in the place for the purpose of violating some positive law; and, since his presence was only a civil trespass and not a criminal act, the conviction must be quashed. Thus the court focussed its attention on the fact that the appellant's presence was a trespass to the land, ignored the act of fornication, and held that a trespasser was not liable to be convicted under the section. By inference, however, it might be said that the court did not consider the fornication as " violating some positive law." If all extra-marital intercourse was regarded as unlawful it is difficult to see how this decision could be followed. Indeed, as far as the inference goes, the case may be considered as an authority for the proposition that not all extra-marital intercourse is unlawful, or at least that extra-marital intercourse is not unlawful for the purposes of section 4 of the 1824 Act.

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[58] Stephen, *History of the Criminal Law*, III, 16: Archbold (29th ed.), 894.

[59] 5 Geo. 4, c. 83.

[60] (1860) 3 L.T. 296.

These three illustrations have been chosen at random and might be multiplied, but others will readily occur to the mind of the reader. Apart altogether from such considerations, it is surely a principle which pervades the common law that the subject's conduct is presumed to be lawful unless it infringes some positive law or definite head of public policy; and not that his conduct is presumed to be unlawful unless it is specifically authorised by law. Furthermore, it is a principle of construction in the case of penal statutes that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of interpretation fail to solve, the benefit of this doubt should be given to the subject and against the legislature which has failed to explain itself.[61] It is felt, therefore, that in no circumstances outside of those already suggested should extra-marital intercourse be regarded as unlawful to the detriment of the individual.

Reference has just been made to the proposition that death caused in the course of doing any unlawful act is at least manslaughter. The older authorities take the view that "unlawful" in this connection covered all acts that were either crimes or torts or were contrary to public policy or morality or were injurious to the public.[62] J. A. C. Turner very ably contends in *The Modern Approach to Criminal Law* that this definition is now too wide in its relation to the law of manslaughter,[63] but the position is still far from clear.

From the preceding analysis it is felt that the point emerges that the word "unlawfully" or "unlawful" is not one which should be lightly used by the draftsman of penal statutes. It has already found its place and worked its mystery in the definition of crimes both statutory and common law. Its use could be avoided by future parliamentarians, in many cases by the inclusion of a proviso, in the definition of the offence, which would create the desired exceptions. In all other cases unless, as in the instance of unlawful assembly, it has been clearly defined by judicial decision, it should be defined by means of an interpretative clause or section. Only when the whole definition of an offence is clear and certain can the rights of an accused who is charged with it be justly determined. The more definite and precise a charge is, the more likely it is that the ends of justice will be served.

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[61] Maxwell, *Interpretation of Statutes* (7th ed.), 244. This passage was adopted by Hewart L.C.J. in *R.* v. *Chapman* [1931] 2 K.B. 606, at p. 609.

[62] Stephen, *History of the Criminal Law*, III, 16.

[63] At pp. 214–215, and 224–230.

Practice and Procedure

Court of Criminal Appeal

The Lord Chief Justice, giving judgment in *R.* v. *MacDonald* (Court of Criminal Appeal: April 27, 1959), said that where the court had treated an application for leave to appeal as an appeal and had reduced the sentence in the absence of the appellant, the appellant was entitled to apply to the court again for a further reduction. In the present case the appellant had taken no steps from October 1958 until March 1959 and the court had thought it right to review the matter. But for the future no such application would be received unless it was made promptly. [H. P.]

Case and Comment *

ATTEMPT

Attempted murder—intent—natural consequences of an act

R. v. Loughlin

Court of Criminal Appeal: Lord Parker C.J., Donovan and Salmon JJ.: May 4, 1959: *The Times*, May 5, 1959.[1]

L. was convicted at assizes of attempted murder of his wife and sentenced to three years' imprisonment. He had pleaded guilty to another count of assault occasioning actual bodily harm. L. appealed to the Court of Criminal Appeal on the ground of misdirection by the trial judge as to the intent necessary to the commission of the crime of attempted murder. The jury had been directed that if a man deliberately did an act, he intended, in law, the natural and probable consequences of that act, and he could not come to the court and say: "I did not intend to do that."

Held, allowing the appeal, that the judge had quite correctly told the jury that they must be satisfied that L. intended to kill his wife, before they could convict him of attempted murder. But unfortunately he had dealt with the presumption that a man was taken to intend the natural consequences of his acts as though it were a matter of law whereas it was, of course, only a matter of fact which the jury should bear in mind together with the totality of the evidence in deciding whether the accused had the necessary intent. This court had considered anxiously whether they should apply the proviso to section 4 of the Criminal Appeal Act, 1907, but, although the evidence against L. was very strong, this court could not say for certain that the jury would have convicted if they had been properly directed. Accordingly it would be unsafe to allow the conviction to stand. However, the conviction for occasioning actual bodily harm stood and a sentence of eighteen months' imprisonment would be imposed in respect of that offence. [H. P.]

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* Reported, unless otherwise stated, by David Calcutt and Henry Palmer, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the appellant: *Alastair Sharp* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Geoffrey Baker* (instructed by W. R. Leatham, Esq., Bradford).

Commentary. It is strange but apparently inevitable that the requirements of *mens rea* should be more strict on a charge of attempting to commit a crime than of actually committing it. This is because, as a general rule, either intention or recklessness will suffice to ground liability for crimes at common law but a charge of attempt, because of the very nature of an attempt, can only be satisfied by proof of an intention to achieve certain consequences. Thus, on a charge of maliciously causing injury to person or property it would suffice to show that the accused foresaw that harm of the kind actually caused was likely to occur as a result of his act, even though he may have hoped that such harm would not occur: *R.* v. *Welch* (1875) 1 Q.B.D. 23. This would obviously not do if the charge were one of attempting the same crime; in that case it would be necessary to show that the accused actually desired the particular type of harm which he actually caused.

The anomaly is even more pronounced where the substantive crime is one which does not require the full *mens rea* of intention or recklessness as to the result which constitutes the *actus reus*. A man may be convicted of murder even though he did not foresee the possibility of the death of his victim if he intended to inflict grievous bodily harm upon him: *R.* v. *Vickers* [1957] 2 Q.B. 664; but on a charge of attempted murder nothing less than an intention to kill will do: *R.* v. *Whybrow* (1951) 35 Cr.App.R. 141. A precisely similar anomaly arises where the definition of a crime requires proof of a specific intent—like causing grievous bodily harm *with intent*. So in *R.* v. *Bourdon* (1847) 2 C. & K. 366, where the accused knocked down the prosecutor by a blow on the head with a towel-roller and was charged with wounding with intent to murder, Maule J. told the jury: "If the prisoner had killed this man, it would have been murder whether he intended to kill him or not; but I think that there is hardly evidence here to support a charge of an intent to murder."

The present case emphasises that the proper test to apply in a criminal case is a subjective and not an objective one; what matters is not what a reasonable man would have intended or foreseen but what the *accused* intended or foresaw. *Cf. R.* v. *Foley* [1959] Crim. L.R. 286 and commentary thereon. These cases demonstrate the absurdity of the rule, which was apparently adopted by the Court of Criminal Appeal in *R.* v. *Ward* [1956] 1 Q.B. 351, that the proper test to apply on a charge of murder is the objective one of the reasonable man. It is submitted that, in so far as *Ward* does lay down such a rule, it should be overruled by the Court of Criminal Appeal under the principle of *R.* v. *Taylor* [1950] 2 K.B. 368.

Incomplete offence—conviction quashed—no power to amend conviction on summary trial

Pender and others v. Smith

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Salmon JJ.: *The Times*, May 1, 1959.[2]

Informations were preferred against four defendants, alleging contraventions of section 100 of the Licensing Act, 1953. Section 100 provides that ". . . no person shall, except during the permitted hours (*b*) consume in, or take from, any [licensed] premises any intoxicating liquor." The defendants were convicted by the Liverpool Stipendiary Magistrate; and their convictions were upheld by the Recorder of Liverpool.

The Recorder, in stating a case, found, *inter alia*, that before 10 p.m. on July 5, 1958, the defendants, or some of them, bought, in the off-license part of an hotel, a crate containing beer and stout which they carried to the smoke room of the hotel. At approximately 10.23 p.m. two of the defendants, accompanied by the other two, were carrying the crate from the smoke room into the entrance hall, when two police officers entered the hall and caused the crate to be deposited on the floor. It was the intention of the defendants to remove the crate from the premises into the highway, and that purpose would have been accomplished by them, as a concerted act, had not the police intervened. On appeal to the Divisional Court,

Held, allowing the appeal, that the words of the section made it clear that no offence was committed until the intoxicating liquor was taken from and got outside the premises; and that the facts of the present case disclosed no substantive offence: the police had struck too soon. [D. C.]

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[2] For the defendants: *Andrew Rankin* (instructed by John Hands & Son for Mr. John O. Cooper, Liverpool). For the prosecutor: *G. W. Guthrie Jones* (instructed by Messrs. Cree Godfrey & Wood, for C. T. Alker, Town Clerk, Liverpool).

Commentary. Where a prisoner is *indicted* for an offence and, at the trial, it appears that he did not complete the offence but merely attempted it, the jury may acquit of the offence charged and convict of the attempt: Criminal Procedure Act, 1851, s. 9. The power of the Divisional Court on a case stated, under section 6 of the Summary Jurisdiction Act, 1857, to "reverse, affirm or *amend* the determination in respect of which the case has been stated," does not, apparently, extend to this case.

Cf. the similar position which prevails in respect of larceny and related offences. Section 44 of the Larceny Act, 1916, allows the conviction of the prisoner for embezzlement or false pretences on indictment for larceny and vice versa; but again, these provisions have no application to summary proceedings. It is submitted that there is no good reason why rules of this nature should not be extended to summary proceedings.

BENCH WARRANT

Failure to surrender to bail—absconding after committal for breach of probation

R. v. Brown

Leeds City Quarter Sessions: G. de P. Veale, Esq., Q.C., Recorder: May 22, 1959.[3]

B. had been placed on probation at Leeds Quarter Sessions on January 2, 1959, for shopbreaking. In April he was brought before the Leeds Magistrates' Court for breach of probation (*i.e.*, failure to comply with the requirements of the order) in accordance with Criminal Justice Act, 1948, s. 6. The court, being satisfied that B. was in breach of probation, committed him for sentence to quarter sessions in accordance with section 6 (3) (*b*), but released him on bail. He failed to surrender to his bail at Leeds Quarter Sessions and the prosecution applied for a bench warrant to be issued.

For the prosecution it was argued that although *R.* v. *Lloyd-Jones and Another*, *ex p. Thomas* [1958] 1 W.L.R. 1110; [1959] Crim.L.R. 48, was not precisely on this point, its principle applied to these circumstances. B. was in exactly the same position as if he had just been convicted on indictment. Furthermore a certificate from the magistrates was before the court in accordance with section 6 (4) (*a*) and under section 6 (4) (*b*) the court had power to deal with the probationer "in any manner in which the court could deal with him if he had just been convicted before that court of that offence." Indeed the wording of section 6 (4) (*b*)—"where the probationer is brought or appears before the court"—implied a power to bring the probationer before the court. It was submitted that even if the power had not been granted to the court by the Criminal Justice Act there was an inherent power in the court to issue a bench warrant as the court was lawfully seised of the matter.

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[3] For the prosecution: *I. R. Boyd* (instructed by Town Clerk, Leeds). Brown did not appear and was not represented.

Held, that it would be ridiculous if there was no power in these circumstances to issue a bench warrant. The court had power to issue a warrant and one would be issued.

[JOHN M. COLLINS, *Barrister-at-Law*.]

Commentary. The decision in *R.* v. *Lloyd-Jones* was based on the fact that under section 29 (3) (*a*) of the Criminal Justice Act, 1948, the Court of Quarter Sessions to which the accused had been committed for sentence, *as soon as they began to inquire into the circumstances of the case*, had power to deal with him in any manner in which he could have been dealt with "by a Court of Quarter Sessions before which he had just been convicted of the offence on indictment."

The wording of section 6 (4) (*b*), however, is different. It is arguable that the words "Where the probationer is brought or appears before the court of assize or quarter sessions, and it is proved to the satisfaction of the court that he has failed to comply with any of the requirements of the probation order," constitute a condition precedent to the court's power to deal with him as if he had just been convicted before them. If that were so, then of course they would not have that power in a case like the present, where the accused did not appear and was not brought before them.

In *R.* v. *Lloyd-Jones* Lord Parker C.J. said, *obiter*, "I do not at the moment see why any court seized of the matter should not have power to issue a warrant in circumstances such as these, where a prisoner fails to surrender to his bail. One would think that the position was that every court would have inherent power to do so. . . ." He concluded, however, "But as far as I can see, the matter has not quite proceeded on those lines." According to *Archbold* (33rd ed.), p. 71 (see now 34th ed., § 197), to which the court referred without disapproval, the common law power would appear to be restricted to a court of record before which an indictment is preferred and signed.

It appears that the Recorder in the present case was of the opinion that he had both an inherent power and a power arising under section 6. Both grounds seem to be an extension of the law as laid down in *R.* v. *Lloyd-Jones.*

It has been suggested that the correct course would have been for the Recorder to have sat as a magistrate for the City and issued a fresh summons or warrant under section 6 (1) of the Criminal Justice Act, 1948.

CHILDREN

Child aged twelve—rebuttal of presumption of incapacity

Ex parte N.

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Salmon JJ.: *The Times*, May 8, 1959.[4]

N., a boy aged twelve, was convicted of stealing certain goods from a shop. His conviction was upheld by the appeals committee of Middlesex Sessions. The father of the boy applied to the Divisional Court for leave to apply for an order of mandamus directed to the chairman of the sessions, requiring him to state a case for the opinion of the High Court. The father asserted that there had been no evidence before the trial court to rebut the presumption that the child was incapable of committing an offence. The father alleged that the chairman had said that N. and his father were well dressed, and that the father had had the wisdom to brief distinguished counsel, thereby indicating that N. had been well brought up. The Divisional Court granted the father leave to apply ([1959] Crim.L.R. 357).

The chairman swore an affidavit in which he said that his conclusion—that the boy understood that he had stolen and that stealing was wrong—was reinforced by the appearance and demeanour of the father and son in court: the boy appeared to be alert, to have good manners and to have a warm relationship with his father.

Held, dismissing the application, that although there had been matter before the committee to rebut the presumption of incapacity, it was dangerous to deduce anything from the demeanour of the father and son in court: if it was a matter of evidence (which was doubtful), it was a matter to which very little (if any) weight could be given.

Per curiam: The transcript of the proceedings disclosed that the chairman had said nothing to the effect that his ruling was based on the father and son having been well dressed; and the remark about counsel had been in the nature of an aside to counsel.

[D. C.]

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[4] For the applicant: *Victor Durand, Q.C.*, and *David Fairbairn* (instructed by Messrs. Carters).

EXTRADITION

Committal to prison—prima facie case made out

Ex parte Johnston

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Salmon JJ.: *The Times*, May 15, 1959.[5]

J. was accused of the commission of the crimes of forgery and uttering forged documents within the jurisdiction of Belgium. The Chief Metropolitan Magistrate issued a warrant, under the Extradition Act, 1870, committing J. to Brixton Prison. J. applied to the Divisional Court for a writ of habeas corpus, on the grounds that there had been, in effect, no evidence before the magistrate that J. had forged or uttered the documents in question, or that if there was such evidence, that there had been no evidence that he had done so within the jurisdiction of Belgium.

It appeared that a fraud involving a great deal of money had been perpetrated in 1954; that one, S., had played a prominent part in the fraud; and that J. had had certain material dealings with S.

Held, that although the evidence against J. was not strong, it was strong enough to justify the magistrate committing J. to Brixton Prison; that if one looked at the matter as if it were committal proceedings, there was sufficient evidence to justify a committal. [D. C.]

Commentary. Prima facie proof of the guilt of the accused must be given before the magistrate according to the English rules of evidence. There must be evidence that the crime was committed within the jurisdiction of the country seeking extradition. In the present case it would seem that the forged documents were uttered in Belgium. In that case the crime was committed there and the applicant, if he was accessory to it, was guilty of a crime within Belgian jurisdiction, notwithstanding that he was in another country at the time.

FACTORIES

Dangerous machinery insecurely fenced—effect of contributory negligence on employer's criminal liability

Dunn v. Birds Eye Foods, Ltd.

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Salmon JJ.: *The Times*, May 1, 1959.[6]

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[5] For the applicant: *Neil Butter* (instructed by the Official Solicitor). For the Governor of Brixton Prison: *John Mathew* (instructed by the Director of Public Prosecutions).

[6] For the appellant: *S. B. R. Cooke* (instructed by Solicitor, Ministry of Labour and National Health). For the occupiers: *Andrew Rankin* (instructed by Messrs. Simpson, North Harley & Co.).

The occupiers of a factory were charged with a contravention of section 14 (1) of the Factories Act, 1937, in that a dangerous part of the machinery in the factory was not securely fenced, and that in consequence one, O., suffered bodily injury, whereby the occupiers became liable to a fine not exceeding £100 as provided by section 133 of the Act.

Section 14 (1) provides that every dangerous part of any machinery shall be fenced; and section 133 provides that "If any person . . . suffers any bodily injury, in consequence of the occupier . . . of a factory having contravened any provision of this Act . . . the occupier . . . shall . . . be liable to a fine not exceeding £100 . . . Provided that (*a*) in the case of injury to health, the occupier . . . shall not be liable to a fine under this section unless the injury was caused directly by contravention."

The justices, who dismissed the information on the ground that there was no case to answer, found, *inter alia,* that O. was employed by the occupiers as a general labourer in the sanitation shift. At the material time he was engaged in cleaning a belt conveyor, which ran over a drum. The drum and belt could have been securely fenced by a fixed guard, but were unfenced at the time of the accident: the operator was, however, in no danger when operating the machine. Notwithstanding his instructions to the contrary, O. left the machinery switched on when cleaning it manually, and his hand was caught in the nip between the drum and the belt. The accident was O.'s own fault. On appeal to the Divisional Court,

Held, allowing the appeal, that section 14 (1) imposed an absolute duty on the occupier to fence the machinery securely: if the machinery had been fenced, the accident would not have happened; and that it was impossible to hold that the accident was not in consequence of the contravention of the section.

Per curiam: If the proviso to section 133 had applied to this case, it might well be that the occupier would not have been liable, since O. was the direct cause of his injury; but the proviso did not apply in the present case, because "injury to health" did not include an injury such as O. had sustained. [D. C.]

Commentary. Contributory negligence was an absolute defence to an action in tort at common law (see now the Law Reform (Contributory Negligence) Act, 1945) but in the criminal law, the fact that a person killed or injured was contributorily negligent was irrelevant: *R.* v. *Swindall and Osborne* (1846) 2 C. & K. 230. Even in the criminal law, however, an accused who had behaved negligently would escape liability if the negligence of the killed or injured person was the exclusive cause of the accident so that it would have happened in just the same way if the accused had been taking all proper care: *R.* v. *Dalloway* (1847) 2 Cox 273. The defence's argument in the present case, that the accident was not "in consequence of" the contravention, as required by the statute, seems to be similar; but in the present case, the accident would presumably not have happened but for the contravention.

SENTENCE

Disqualification from driving—maximum period exceeded—severance from conviction and fine

R. v. Arundel JJ., ex p. Jackson

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Salmon JJ.: *The Times*, April 30, 1959.[7]

J. was convicted of driving without due care and attention, contrary to section 12 of the Road Traffic Act, 1930, and was fined £20 and disqualified from holding or obtaining a driving licence for twelve months. J. had no previous conviction. The maximum period for which J. was liable to be disqualified under the Act was one month. On an application for certiorari,

Held, that the disqualification was supplemental to and severable from the fine and conviction, and that the disqualification (and not the whole order) would accordingly be quashed. [D. C.]

Commentary. If justices impose a sentence which is not authorised by law for the offence for which the defendant is convicted, the conviction is bad on its face and must be quashed. The High Court has no power, on certiorari, to amend the conviction by substituting another sentence for that imposed. Accordingly, where an applicant had been fined £15 for failing to stop a motor-vehicle when so required by a police constable, an offence for which the maximum fine was only £5, his conviction was quashed: *R.* v. *Willesden Justices, ex p. Utley* [1948] 1 K.B. 397. Conviction and sentence are not severable and must stand or fall together. It was recognised by Lord Goddard C.J. in the *Willesden Justices* case that "it would, perhaps, be a good thing if the law were altered by legislation," and it is submitted with respect that it is desirable that the rule should be confined within the narrowest possible limits.

The record of the conviction and sentence is severable from the conviction and sentence and may be quashed while leaving conviction and sentence standing: *R.* v. *Huntingdon and Leightonstone Justices, ex p. Simpkin & Coombes* [1959] Crim.L.R. 367.

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[7] For the applicant: *J. Raymond Phillips* (instructed by Messrs. Charlton Hubbard & Co. for Messrs. Malcolm, Wilson & Cobby, Worthing). For the prosecutor: *Anthony Harmsworth* (instructed by Mr. T. C. Hayward, Chichester).

STREET TRADING

Licence—registered street trader—whether entitled to trade without licence

Haley v. Denyer

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Salmon JJ.: *The Times*, April 25, 1959.[8]

H. was convicted of selling goods from a vehicle in a restricted street, he not being a person licensed to do so, contrary to regulation 2 of the London (Waiting and Loading) (Restriction) Regulations, 1958. Regulation 2 provides that " No person shall . . . sell goods from a vehicle in any restricted street . . . unless (*b*) that person is licensed by the local authority concerned to sell goods from a stationary pitch and to sell goods from that pitch."

The magistrate, in stating a case, found, *inter alia*, that H., on the day in question, sold goods from a vehicle outside a certain restaurant, and that he was the holder of a certificate of registration as a street trader issued by the local authority, pursuant to section 19 of the London County Council (General Powers) Act, 1947. Section 19 (6) provides that " A registered street trader shall be entitled to engage and continue to engage in street trading to the like extent and in the like manner as if he held an annual licence." On appeal to the Divisional Court,

Held, dismissing the appeal, that the words " unless . . . licensed by the local authority " referred to the grant of an actual licence; and that since H. was not the holder of a licence but merely a registered street trader he was guilty of an offence under regulation 2. [D. C.]

Commentary. The court pointed out that in previous regulations from 1951 to 1957 the words had always been " unless that person is licensed *or otherwise duly authorised by the local authority*." In the present regulations the italicised words were omitted and the obvious implication was that only a licence would now suffice.

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[8] For H.: *Peter Solomon* (instructed by Mr. M. R. Goldman). For the prosecutor: *Brian Leary* (instructed by the Solicitor, Metropolitan Police).

TRIAL

Misdirection—failure to put particular defence to the jury

R. v. Scott

Court of Criminal Appeal: Lord Parker C.J., Donovan and Salmon JJ.: April 13, 1959: *The Times*, April 14, 1959.[9]

S. was convicted at quarter sessions of assault occasioning actual bodily harm to a Jamaican, one W. The undisputed facts were that a gang of white men had set upon some Jamaicans. A witness gave evidence that S. was kicking W. S.'s defence was that he was trying to prevent two friends from joining in, that when the police came all the others had run away and that he was about to help the injured man. S. appealed to the Court of Criminal Appeal on the ground that the jury had not been properly directed as to the defence.

Held, allowing the appeal, that this was clearly a case which called for some direction to the jury as to what the accused's defence was. The recorder began his summing-up by saying: "What you will have to decide . . . is, Did this man do it?" and at the very end he said: "You decide the facts and judge them upon the evidence as a whole, including especially the evidence of the accused." This court did not want to say anything which suggested that in every case the judge should put before the jury every bit of evidence on both sides, but here it was clear that something more was required than the defence: "I did not do it." It was significant that the jury, after an hour's retirement had asked to be reminded of the evidence of anyone who saw the defendant kicking the man. Again it was significant that in reminding the jury of the evidence there was no reminder of S.'s defence that he took no part in this whatsoever. In these circumstances the conviction must be quashed. [H. P.]

Commentary. It is a "paramount principle" of our criminal law "that when a defence, however weak it may be, has been raised by a person charged, it should be fairly put before the jury": *R.* v. *Dinnick* (1909) 3 Cr.App.R. 77. *Cf. R.* v. *Lankford* [1959] Crim.L.R. 209, and *R.* v. *Colletti and Oliver* [1959] Crim.L.R. 297.

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[9] For the appellant: *J. R. Hopkin* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *P. D. Cotes-Preedy* (instructed by T. J. Owen, Esq., Nottingham).

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Imprisonment

In R. *v.* REGAN the court (Lord Parker C.J., Donovan and Salmon JJ.: April 27, 1959) reduced a sentence of three years' imprisonment to one of eighteen months' imprisonment. R. had been convicted at quarter sessions of receiving; at the same time the thief, one C., pleaded guilty to housebreaking and larceny and was sentenced to eighteen months' imprisonment (two other offences being taken into consideration). R., who was a man of forty-four years of age, was in a substantial way of business as a building and demolition contractor. He had one previous conviction in 1947 when he was fined for larceny. The court stated that, whilst it was undoubtedly true that receiving was a particularly serious offence and often carried a longer sentence than that accorded to the thief himself, in this case the recorder in passing sentence apparently took into consideration the facts that R. was not prepared to plead guilty, that he stood his trial, that he made various accusations against the police, and in the end was found to be plainly guilty. A proper sentence for R. was the same as that passed on C. and, accordingly, the sentence would be reduced to one of eighteen months' imprisonment.

In R. *v.* MCCARTHY the court (Lord Parker C.J., Donovan and Salmon JJ.: April 27, 1959) dismissed an appeal against a sentence of three years' imprisonment passed upon M. at quarter sessions for attempted burglary. M. was a man of thirty-seven years of age with six previous convictions. The court stated that there were in this case mitigating circumstances. M. had ended five years in the Navy with a character assessed at good or very good; and he was not in trouble between 1951 and 1958. However, in passing sentence, the recorder had said that there was " far too much of this sort of offence going on," and this court felt that where housebreaking and burglary were concerned the deterrent element of a severe sentence must be borne very carefully in mind. It might be thought, considering an individual in isolation, that three years' imprisonment was severe, but having regard to the prevalence of this sort of crime this court was of the clear opinion that there was no ground for interfering with the sentence.

In R. *v*. CONNOLLY the court (Lord Parker C.J., Donovan and Salmon JJ.: May 4, 1959) reduced a sentence of five years' imprisonment to one of eighteen months' imprisonment. C. had pleaded guilty at a magistrates' court to stealing two letters from a hall table in a house and was sentenced by a Crown Court. C., who was a man of thirty-four years of age, had been previously sentenced to approved school, Borstal, three years' corrective training (in 1950), and had many sentences since then for larceny. The court stated that, if preventive detention was not imposed in cases of this sort, the sentence must bear some relation to the gravity of the offence. The offence of stealing two letters valued at 6s., hardly merited of itself five years' imprisonment. Accordingly, that sentence would be set aside and a sentence of eighteen months' imprisonment substituted.

In R. *v*. CHESSHER the court (Lord Parker C.J., Donovan and Salmon JJ.: May 12, 1959) reduced a sentence of twenty-one months' imprisonment to one of six months' imprisonment. C. had been convicted at quarter sessions of stealing wood. About three months before the present conviction C. had been convicted of a similar offence and fined a total of £750 or imprisonment for a total of fifteen months. Payment of a part of that fine was just due at the date of the present conviction. The court stated that the chairman of quarter sessions had arrived at the period of twenty-one months in the present case by adding the period of fifteen months to the six months he thought appropriate to the offence. The effect of doing that was to alter the previous sentence and there was no power to change the prior sentence, either as regards the amount of payment, time of payment or imprisonment in default of payment. This court agreed that six months' imprisonment was the appropriate sentence for the present offence and, accordingly, a sentence of imprisonment for that period would be substituted for the sentence of twenty-one months' imprisonment.

Preventive detention

In R. *v*. HUNT the court (Lord Parker C.J., Donovan and Salmon JJ.: May 11, 1959) reduced a sentence of seven years' preventive detention to one of five years' imprisonment. H. was convicted at quarter sessions of breaking into a tobacco warehouse (with another man) and stealing £5,000 worth of cigarettes. H., who was a man of thirty-four years of age, had five previous convictions. His last sentences were twenty-one months' imprisonment in 1952 for burglary and assault with intent to resist arrest, and three years' corrective training in June 1955. The court stated that H. was a comparatively young man for preventive detention, and that after his release from corrective training he had apparently kept out of trouble and worked for a full year. On the whole the court thought that this was a case for imprisonment rather than preventive detention and, accordingly, a sentence of five years' imprisonment with an order under section 22 of the Criminal Justice Act, 1948, would be substituted for the sentence of preventive detention.

In R. *v*. HAMILTON the court (Lord Parker C.J., Donovan and Salmon JJ.: May 12, 1959) reduced a sentence of eight years' preventive detention to one of imprisonment for three years. H. had pleaded guilty at a magistrates' court to larceny and was sentenced by quarter sessions (four other offences being taken into consideration). H., who was a man of forty-three years of age, had fourteen previous convictions for offences of dishonesty. The present offences consisted of stealing a £10 battery, a jack, sidelights and various property to the value of about £11 from parked vehicles; breaking into a yard and stealing £10 worth of property from a lorry; and stealing an acetylene torch and some gauges. The court stated that H. had never previously received a sentence of more than twelve months' imprisonment and, in the circumstances, the sentence of preventive detention was excessive. Accordingly, that sentence would be reduced to one of three years' imprisonment with an order under section 22 of the Criminal Justice Act, 1948.

Corrective training

In R. *v*. HARFLEET the court (Lord Parker C.J., Donovan and Salmon JJ.: May 4, 1959) altered a sentence of four years' corrective training to one of four years' imprisonment. H. had pleaded guilty at quarter sessions to three counts of office-breaking and larceny, office-breaking with intent and possessing housebreaking implements by night (six other offences being taken into consideration). H., who was a man of twenty-two years of age, had six previous convictions, mainly for breaking and entering and stealing. His last sentence was one of two years' imprisonment, from which he was released on December 27, 1958. The next day he began the present series of offences. The court stated that they had no doubt that H. fully merited the sentence which he had received. The only doubt which this court had was in regard to the report of the Prison Commissioners which said that H. would not, in the view of the Commissioners, respond to further training. The chairman at quarter sessions had appreciated that, but had imposed the sentence of corrective training in the hope that it was in H.'s best interests. This court, however, felt that it would be wrong to fill a space in a corrective training institution with a man who was completely unsuitable, and, accordingly, the court would substitute a sentence of four years' imprisonment with an order under section 22 of the Criminal Justice Act, 1948.

Borstal training

In R. *v.* SMITH the court (Lord Parker C.J., Donovan and Salmon JJ.: April 27, 1959) approved sentences totalling twelve months' imprisonment. S. had pleaded guilty at quarter sessions to housebreaking and to making a false statement in order to obtain a certificate of insurance, also to driving while disqualified. He was sentenced to six months and six months' imprisonment consecutively, and disqualified from driving for five years. S. was a young man of eighteen years of age and had several previous convictions for road traffic offences. The court stated that the offences were undoubtedly serious and the appellant's record showed that he had absolutely no regard for the Road Traffic Acts. The court had considered whether, in view of his age, Borstal training was the proper sentence, but Borstal training was not an appropriate sentence for road traffic offences. The court had concluded that imprisonment here was the only appropriate sentence.

Probation

In R. *v.* BURROWS the court (Lord Parker C.J., Donovan and Salmon JJ.: May 11, 1959) varied a sentence of Borstal training to one of probation for three years. B. had pleaded guilty at quarter sessions to two offences of shopbreaking and larceny. B., who was a young man of seventeen years of age, had one previous conviction for an offence of stealing 1s. 3d. The court stated that B. had a good work record as a trainee miner and that they had been told he could go back at once to complete his training. He had been in prison since January and the prison governor had reported that he appeared to be more foolish than criminal. In the circumstances a probation order for three years would be substituted for the sentence of Borstal training.

Acts and Orders[*]

Betting

SMALL LOTTERIES AND GAMING ACT, 1956 (AMENDMENT) ACT, 1959 (7 & 8 Eliz. 2, c. 35) (3d.). Operative June 14, 1959. In any proceedings instituted under section 141 (1) of the Licensing Act, 1953 (which penalises the holder of a justices' licence who allows gaming or unlawful games on his premises), it shall be a defence to prove that the gaming or unlawful game to which the proceedings relate was such a lottery as is, by section 1 of the Small Lotteries and Gaming Act, 1956, deemed not to be an unlawful lottery. The Act does not extend to Northern Ireland.

Food and Drugs

The Ice-Cream (Heat Treatment, etc.) Regulations, 1947 to 1952 (S.R. & O. 1947, No. 612; S.I. 1948/819, 1951/67, 1952/815), are revoked and replaced in consolidated form with amendments. Ingredients used in the manufacture of ice-cream are required to be pasteurised by one or other of three specified methods or sterilised and thereafter kept at a low temperature until the freezing process is begun. It is made an offence to sell or offer for sale ice-cream which has not been so treated or which has been allowed to reach a temperature exceeding 28° Fahrenheit without again being treated. These requirements are not to apply to certain types of water ices and ice lollies which are sufficiently acid to make such treatment unnecessary. Operative April 27, 1959. ICE-CREAM (HEAT TREATMENT, ETC.) REGULATIONS, 1959 (S.I. No. 734) (3d.).

For penalties for contraventions, see Regulation 7 of these Regulations.

London Traffic

The London (Waiting and Loading) (Restriction) Regulations, 1958 (S.I. No. 660), which imposed certain restrictions with regard to the waiting, loading and unloading and on the use of vehicles for the purpose of advertisement and for the sale of goods from vehicles, in certain streets within the London Traffic Area, is amended so that certain streets or parts of streets in Barking, Beckenham, Lambeth, Lewisham, Southall, and Wandsworth and

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[*] Prepared by F. Maurice Drake, *Barrister-at-Law*.

Banstead are now brought within the provision of the Regulations. Operative May 12, 1959. LONDON (WAITING AND LOADING) (RESTRICTION) (AMENDMENT) REGULATIONS, 1959 (S.I. No. 804) (3d.).

For penalties for contraventions, see Regulation 15 of the 1958 Regulations (S.I. 1958, No. 660).

The following Order has been made prohibiting waiting: S.I. No. 798 (Oxted, Surrey) (3d.).

The following Order revokes a previous Order prohibiting waiting: S.I. No. 797 (revoking S.I. 1953, No. 968) (Nazeing) (2d.).

The following Orders have been made regulating the maximum weight of vehicles which are permitted to use certain routes: S.I. Nos. 799 (Denham) (3d.); 251 (Surrey) (2d.).

The riding of any bicycle or tricycle, whether or not propelled by mechanical power, in certain pedestrian subways in Ilford, including parts of the approaches to such subways, is prohibited. Operative May 12, 1959. LONDON TRAFFIC (PROHIBITION OF CYCLING IN PEDESTRIAN SUBWAYS) (ILFORD) REGULATIONS, 1959 (S.I. No. 805) (3d.).

For penalties for contraventions, see Regulation 3 of these Regulations.

The following Orders have been made detailing prescribed routes: S.I. No. 795 (Brentford and Chiswick) (2d.); 796 (Hampstead) (2d.); 803 (East Ham) (2d.); 821 (Islington) (3d.); 885 (St. Marylebone (No. 2)) (3d.).

Medicine

Certain substances, which are specified in Regulation 2, are brought within the scope of Part II of the Therapeutic Substances Act, 1956, so that their sale and supply are controlled. Operative May 11, 1959. THERAPEUTIC SUBSTANCES (CONTROL OF SALE AND SUPPLY) REGULATIONS, 1959 (S.I. No. 732) (3d.).

For penalties for contraventions, see sections 6 and 12 of the Therapeutic Substances Act, 1956.

Merchandise Marks

The Order of 1928 (S.R. & O. 1928, No. 570) which, as already amended, prohibits the importation into and sale in the United Kingdom of imported pottery of various descriptions unless it bears an indication of origin, is further amended by extending its provisions to cover stoneware, glazed red, yellow and brown ware, ornamental pottery, pottery for mounting and pottery toys. It also provides alternative methods of applying the indication of origin to articles of pottery where, owing to their small size or peculiarity of shape or surface, it is not reasonably practicable to apply it to the articles themselves. Operative November 13, 1959. MERCHANDISE MARKS (IMPORTED GOODS) NO. 2 ORDER, 1928, AMENDMENT ORDER, 1959 (S.I. No. 866) (3d.).

For penalties for contraventions, see section 5 of the Merchandise Marks Act, 1926.

Merchant Shipping

Finland has acceded to the International Convention for the Prevention of Pollution of the Sea by Oil, 1954. Operative May 22, 1959. OIL IN NAVIGABLE WATERS (CONVENTION COUNTRIES) (FINLAND) ORDER, 1959 (S.I. No. 869) (2d.).

Offensive Weapons

RESTRICTION OF OFFENSIVE WEAPONS ACT, 1959 (7 & 8 Eliz. 2, c. 37) (3d.). Operative June 14, 1959. It is made an offence to manufacture, sell, hire, offer for sale, lend, give to any person or import (a) any knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in or attached to the handle of the knife (sometimes known as a "flick knife" or "flick gun"); or (b) any knife which has a blade which is released from its handle or sheath by gravity or the application of centrifugal force and which, when released, is locked in place by means of a button, spring, lever, or other device (sometimes known as a "gravity knife"). The penalty on summary conviction in the case of a first offence is imprisonment for up to three months or a fine not exceeding £50, or both, and in the case of a second or subsequent offence it is imprisonment for a term not exceeding six months or a fine not exceeding £200 or to both. The Act does not extend to Northern Ireland.

Police

POLICE FEDERATION ACT, 1959 (7 & 8 Eliz. 2, c. 38) (3d.). Operative June 14, 1959. The provisions of the Schedule to the Police Act, 1919 (9 & 10 Geo. 5, c. 46), which makes provision as to the constitution, functions and proceedings of the Police Federation, is amended as from the year 1960. The effect of the amendments is that the dates of the elections for the Branch Boards and of the annual meetings of the Branch Boards and Central Conferences of the Police Federation may now be held at such time as the Secretary of State may specify, after consulting the three Central Committees sitting together as a joint Committee. Hitherto the dates of these meetings were fixed, within certain limits, by the Schedule to the Act.

Road Traffic

The Traffic Signs General Directions, and Regulations, 1957 (S.I. No. 13, as amended by S.I. 1957, Nos. 2149 and 2150), are further amended. The main changes are: (1) Section 49 of the Road Traffic Act, 1930 (which makes it an offence to fail to conform to the indications given by certain traffic signs lawfully placed on or near roads), is applied to the new carriageway marking, referred to as " the double white line marking," which is shown in Diagram RM 21 in the Schedule to these Regulations (Regulation 2 (1)). (2) Section IV of the 1957 Regulations is replaced by a section making amended provision as to the size, colour and type of carriageway markings which may be placed on roads. The chief amendments are: (a) the double white line marking is to convey the requirements that, subject to certain exceptions, (i) vehicles must not stop on any length of road along which that marking has been placed; and (ii) vehicles must travel so as to keep to the left of the continuous line where it is placed on the left of a dotted line or a continuous line; and (b) the provisions of the section shall cease to have effect in so far as they relate to the carriageway markings comprising a single continuous line, except that in respect of existing markings of this kind they shall not cease to have effect until May 12, 1962 (Regulation 2 (II)). (3) Certain new carriageway markings are prescribed, including a yellow line to indicate a side of a length of road on which the loading and unloading of vehicles is prohibited or restricted (Regulation 2 (III)). Operative May 12, 1959. TRAFFIC SIGNS GENERAL DIRECTIONS, 1959 (S.I. No. 760) (2d.). TRAFFIC SIGNS (AMENDMENT) REGULATIONS, 1959 (S.I. No. 761) (6d.).

For penalties for contraventions, see section 113 of the Road Traffic Act, 1930.

Scotland

The Adoption Societies (Scotland) Regulations, 1943 (S.R. & O. 1943, No. 540), are revoked and, so far as they relate to adoption societies, replaced with minor amendments. The 1943 Regulations did not apply to local authorities but the new Regulations 4 to 8 are, by Regulation 9, applied to local authorities who make or participate in arrangements for the adoption of children. Regulations 7–8, which relate to the confidentiality of information and records and to the preservation of records, are new provisions. Operative May 1, 1959. ADOPTION AGENCIES (SCOTLAND) REGULATIONS, 1959 (S.I. No. 773) (5d.).

Regulations have been made dealing with the conduct of children's homes provided by a local authority under section 15 of the Children Act, 1948, and of voluntary homes except homes which are remand homes, or voluntary homes subject to inspection by a Government Department otherwise than under Part VI of the Children and Young Persons (Scotland) Act, 1937, or homes used solely for providing holidays of less than one month. There are provisions as to medical and dental care of the children, standards of sleeping accommodation, fire precautions, discipline, records, and for the notification of certain contingencies to the Secretary of State. Operative August 1, 1959. ADMINISTRATION OF CHILDREN'S HOMES (SCOTLAND) REGULATIONS, 1959 (S.I. No. 834) (4d.).

New Regulations have been made relating to the boarding-out of children by local authorities and other voluntary organisations. The previous Regulations of 1947, which applied only to the boarding-out of children by local authorities and *not* by other voluntary organisations, are revoked. The new provisions do not apply in the case of children boarded-out for a holiday, or for less than one month, or by the managers of an approved school. The Regulations include provisions as to the consideration of a child's suitability for boarding-out, the medical and dental examination of children, suitability of foster parents and foster homes, visits and reports thereon, supervision and termination of boarding-out and records to be maintained and information to be exchanged by responsible authorities. Provision is also made for the limitation of boarding-out in any area. Operative August 1, 1959. BOARDING-OUT OF CHILDREN (SCOTLAND) REGULATIONS, 1959 (S.I. No. 835) (5d.).

DEER (SCOTLAND) ACT, 1959 (7 & 8 Eliz. 2, c. 40) (1s. 3d.). Operative June 14, 1959. Further provision is made for the conservation and control of red deer in Scotland, under the direction of a commission to be constituted and known as " the Red Deer Commission." This commission may, with the approval of the Secretary of State, set up in any locality a panel of five persons to represent various specified interests. The Commission is required to carry out various activities in furtherance of the objects of the Act (Part I) and a person who wilfully obstructs any person acting in the execution of this part of the Act is guilty of an offence and is liable on summary conviction to a fine not exceeding £50, and in the case of a second or subsequent conviction to a fine not exceeding £100 or to a term of imprisonment not exceeding three months or to both (section 17). Close seasons for red deer are specified in Part II, and the Secretary of State is empowered to fix by Order close seasons for other species. Penalties for contraventions are provided (section 21 (5)). Part III prohibits poaching and makes it unlawful to take or kill deer in certain circumstances and at certain times. Penalties for contraventions are provided for by sections 22, 23 and 24. Part IV deals with enforcement of the Act and procedure. Section 26 makes an attempt to commit an offence under the Act punishable in the same manner as for the offence itself; section 31 deals with offences by bodies corporate.

Practical Problems

All questions for consideration should be addressed to " The Editor, The Criminal Law Review, 2 & 3 Chancery Lane, W.C.2." The questions of readers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

58. *Road Transport Lighting—bicyclist pushing a riderless bicycle*

A was riding a man's standard type pedal cycle along a busy main road at night and he was pushing a riderless lady's standard type pedal bicycle without obligatory lights on his off side. His left hand was grasping the centre of the handlebar of his own machine and he was pushing the lady's bicycle with his right hand on the centre of the handlebar. As both machines were fitted with roller brake levers A would have to move his hand to apply them. He was travelling at a moderate speed and maintained a fairly steady course except when negotiating bends, etc.

A was reported for contravention of section 6 of the Road Transport Lighting Act, 1957, and also for riding a bicycle without reasonable consideration for other persons using the road, contrary to section 12 of the Road Traffic Act, 1930, as amended by section 11 of the Road Traffic Act, 1956.

Some controversy has arisen whether any offence other than the " No Lights " is disclosed.

What offence, if any, has been committed by A? [G. A. F.]

ANSWER

I agree that the rider has committed an offence against section 6 of the Road Transport Lighting Act, 1957, and I do not think there can be any possible doubt about this.

The only other possible offence committed by the rider is that suggested in the above question, namely, riding without reasonable consideration for other persons using the road. Since the rider would have to move his hand to apply the brakes of the second machine and, in any event, had only one free hand to control his own bicycle, it can be argued with considerable force that he was a danger on the road in that if any unexpected circumstance arose he would be the less able to deal with it; and that by depriving himself of his ability to control his bicycle as well as possible he was thereby riding " without reasonable consideration " for other persons using the road.

On the other hand, it can be argued with equal force that he had in fact done nothing dangerous and maintained reasonable control over both machines; and that the offence against section 12 of the Road Traffic Act, 1930, as provided by section 11 of the Road Traffic Act 1956, had not been committed but had, at most, got to the stage where it was potentially *likely* to be committed. In my opinion it would be open to the Bench to decide this case either way, but I am inclined to the view that no offence is disclosed. If this *is* an offence then it follows that it is *always* an offence to ride one bicycle whilst controlling another; and if this were the intention of the legislature I think they should and would have made it an offence in plain terms.

For the above reasons my own view is that no offence, save that in respect of the lights, has been committed. [M. D.]

Letters to the Editor

Taking other offences into consideration

Sir,

I have read with interest R. D. Margrave-Jones's article on " Taking other offences into consideration " but the one point I was hoping he would mention has not appeared.

I refer to the question of taking into consideration offences under section 28 of the Road Traffic Act, 1930, of taking and driving away a motor-vehicle without the consent of the owner, etc.

As you are aware, this is on the hybrid offences, and, by section 18 of the Magistrates' Courts Act, 1952, an offence of this nature is dealt with summarily unless the prosecution asks at the commencement of proceedings that it should go for trial.

Normally, then, when a person stands charged with an offence under section 28, the court has no power to take into consideration any similar offences committed outside the jurisdiction of that court.

It happens very often that a criminal, generally an escapee from an approved school or Borstal, steals a car early in his escape, and by the time he is arrested has taken and abandoned upwards of a dozen cars. He is brought before the magistrates who can only try any offences committed within their jurisdiction, but can do nothing about the other offences committed in other counties.

If the offender is not to get away unpunished, each police force must take individual action against him, or arrange that one force asks for their case to go for trial when all outstanding cases can be considered. The alternative is to write the crime off, and take no further action, in which case the criminal's record is very often not a true record of all the offences he has committed.

It would seem that this is yet another part of our law which needs revising, and I would be glad of Mr. Margrave-Jones's views on the matter.

Yours truly,
R. GOSLING.

Banbury, Oxon.

[*Mr. Margrave-Jones writes*: The effect of section 18 of the Magistrates' Courts Act, 1952, is not quite as stated by your correspondent. When a magistrates court is dealing with an offence triable either on indictment or summarily, the court must proceed to inquire into the information as examining justices. It is not for the prosecution to ask for the case to go for trial on indictment. In practice, of course, the prosecutor usually applies, either expressly or by necessary implication, for the summary trial of the offence.[1]

This means that a "hybrid" offence, such as the taking and driving away of a motor-vehicle without the owner's consent, is regarded as an indictable offence for the purpose of giving a magistrates' court jurisdiction as examining justices. If, therefore, a person who has committed a number of such offences in different localities "appears or is brought"[2] before a magistrates' court which has jurisdiction as examining justices, that court is not confined by any local jurisdiction, provided that the hearing begins by the taking of depositions.[3]

The proceedings may then be switched to summary trial[4] and the court, after convicting the offender, would be able to take into account other offences for which the offender could have been brought before the court by virtue of the extended jurisdiction of the justices. In many cases it will be found that the most convenient court of trial is the one for the county in which the offender resides or is believed to reside. Such a court, employing the procedure mentioned, would have jurisdiction to try, and so the power to take into consideration, similar offences committed anywhere in England or Wales.

The procedure suggested enables all offences to be dealt with by one court and it has the additional advantage that if the magistrates consider, on hearing of the outstanding offences,[5] that their powers of punishment are inadequate, they may commit the offender to quarter sessions for sentence."]

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[1] See *Ex p. Rigby* [1958] 3 All E.R. 30.

[2] Magistrates' Courts Act, 1952, s. 2 (3). For meaning, see *Blandford* [1955] 1 All E.R. 681, 683.

[3] See Magistrates' Courts Act, 1952, s. 2 (4).

[4] Under Magistrates' Courts Act, 1952, s. 18 (3).

Books and Periodicals

Book reviews

Archbold: Criminal Pleading, Evidence and Practice. 34th edition. By T. R. Fitzwalter Butler and Marston Garsia, Barristers-at-Law. London: Sweet & Maxwell, Ltd. 1959. cxcvi, 1620 and (index) 99 pp. £5 5s. net. Cumulative Supplemental Service, 12s. 6d. per annum. Noter-up Service, 8s. 6d. per annum.

As the editors emphasise in their preface to the new edition, *Archbold* is a practitioner's and not a jurist's book. If what is sought is the fundamental principles of the criminal law, the policies underlying it, the direction of present trends, or an evaluation of the rules of law, *Archbold* is not the book to turn to—but it does not purport to be and is content to leave these matters to more academic works. As a comprehensive collection of the authorities on criminal law, procedure and evidence, however, it is incomparable and, for this reason it justifies the publisher's claim that it is indispensable.

Putting in everything, however, has its dangers. Particularly, there is a risk of leaving in the text old cases, which are inconsistent with, though not expressly overruled by, modern decisions of superior authority. The editors of *Archbold* bear a particularly heavy responsibility in this regard for, such is the standing of the book, the fact that a case is set out therein seems too often to be regarded as sufficient warrant for following it without further research. It was apparently thus that both a judge in Hong Kong (*Chan Kau* v. *R.* [1955] A.C. 206) and an English judge (*R.* v. *Lobell* [1957] 1 Q.B. 547) were misled into following the direction on burden of proof in *R.* v. *Smith* (1837) 8 C. & P. 160, although that case, though not expressly overruled, had ceased to be law on that point in 1935 when *Woolmington's* case was decided. Needless to say, in the new edition an ample warning is given. The same danger arises, however, in connection with *R.* v. *Wilson* (1839) 9 C. & P. 27. Academic lawyers have disputed (perhaps at excessive length) as to whether *R.* v. *Davenport* (1954) 38 Cr.App.R. 37 is rightly decided, but they are (your reviewer believes) at least agreed that it is inconsistent with *Wilson*. If *Davenport* is right there is, to say the least, grave doubt whether *Wilson* is good law; but both cases are set out as authorities in different sections (1707 and 1727) and there is no cross-referencing between them.

It is not only with respect to recent cases that such inconsistencies may be found. The facts of *R.* v. *Atkinson* (1799) 2 East P.C. 673 and *R.* v. *Adams* (1844) 1 Den. 38 are set out in section 1480 as illustrations of circumstances not amounting to larceny, yet it would seem that ever since *Cundy* v. *Lindsay* (1878) 3 App.Cas. 459 it has been clear that these circumstances do amount to larceny (see [1958) Crim.L.R. 92) and the cases are inconsistent with *R.* v. *Middleton* (1873) L.R. 2 C.C.R. 38, set out in section 1500.

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[5] Magistrates' Courts Act, 1952, s. 29; see *Vallett* [1951] 1 All E.R. 231.

Admittedly, the editors expressly disclaim any intention of attempting to reconcile all the decisions on the law of larceny—and for that, one can hardly blame them. But surely the practitioner is entitled to be given at least a hint that a case, set out *in extenso* for his information, may possibly be wrong because of other authorities cited in another —and perhaps far-removed—section? It is very unhelpful, moreover, to be given the facts of cases (*cf. R.* v. *Hudson* [1943] K.B. 458 and *Moynes* v. *Coopper* [1956] 1 Q.B. 439 set out in successive sections (1471 and 1472)) in such a manner that they appear to be irreconcilable, with no indication of how the court in the one distinguished the other.

The same danger arises, *a fortiori*, in the case of statutes. The following proposition is to be found in section 2508: "If there is no sufficient material . . . for a reasonable jury to form the view that a reasonable person so provoked could be driven [[to lose his self-control], it is the duty of the judge as a matter of law to direct the jury that the evidence does not support a verdict of manslaughter." While this was undoubtedly the law before 1957, it seems now to be inconsistent with the provisions of the Homicide Act that "where . . . there is evidence on which the jury can find that the person charged was provoked . . . to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury."

While on the subject of provocation, it ought, perhaps, to be mentioned that there is a serious omission. The propositions, in section 2484 that "no provocation, however great, will extenuate or justify homicide when there is evidence of express malice" and, in section 2503, that when "the provocation inspires an actual intention to kill or to inflict grievous bodily harm only one special exception has been recognised as reducing murder to manslaughter" express a view of the law which was repudiated by the Privy Council in *Att.-Gen.* (*Ceylon*) v. *Kumarasinghege Don John Perera* [1953] A.C. 200, in a judgment delivered by Goddard L.C.J. This case is not cited at all.

Just as outmoded cases are retained, so old statements of general principles from the writers of authority tend to be left in when it is plain that they are much too wide to be accurate today. In section 47 it is stated that "if an unforeseen consequence ensues from an act which was in itself unlawful, and its original nature wrong and mischievous, the actor is criminally responsible for whatever consequences may ensue." This proposition may be accurately taken from Blackstone but a reference to *R.* v. *Cunningham* [1957] 2 Q.B. 396 is sufficient to show that it certainly does not represent the modern law. Hale's rule that there must never be a conviction of murder or manslaughter unless "at least the body be found" is surely law no longer since *R.* v. *Onufrejczyk* [1955] 1 Q.B. 388 yet it is still set out in sections 1141 and 2484, and, in the former section *Onufrejezyk* is not even referred to. In view of *Onufrejczyk* the retention of dicta on the point from a South African case of 1879 and a Queensland decision of 1903 seems rather pointless; but *R.* v. *Horry* [1952] N.Z.L.R. 111 which is not referred to might well be included.

The book could be enormously improved by the incorporation of some of the results of work appearing in the legal periodicals. To take just one example, in section 1734 it is stated categorically that, in embezzlement, the "thing received must be the master's property." Mr. Turner has shown very clearly in the pages of this *Review* ([1956] Crim.L.R. 662) that this proposition is untrue and that *R.* v. *Beacall* (1824) 1 C. & P. 454 (referred to in two other sections of *Archbold*) establishes its falsity. If it is too much to expect the results of such academic research to be incorporated into the text surely the time has come when at least the references to relevant articles might be included.

Archbold's faults did not, of course, originate in the present edition, not even under the regime of the present editors. They, as busy practitioners, have done as much as, or more than, could be expected of them in accomplishing the very formidable task of incorporating the large amount of new material which has accumulated since the last edition, with, so far as this reviewer can see, hardly any omissions. In so doing they will have earned the gratitude of all concerned with the criminal law. If, however, the book is not to degenerate, through successive editions, into a mere digest of cases and statutes it needs to be substantially re-written in the near future. As the above examples surely show, the neglect of legal principles in favour of the mere accumulation of authorities has gone much too far.

The book is to be kept up to date, as before, by the very efficient thrice-yearly supplemental service, and comes with the first supplement already inserted. As always it is admirably produced.

J. C. SMITH.

Books received:

Stone's Justices' Manual 1959. 91st edition by J. Whiteside and J. P. Wilson. London: Butterworth & Co. 1959. Thick edition, 92s. 6d. net. Thin edition, 97s. 6d. net.

Moriarty's Police Law. 15th edition by C. C. H. Moriarty and W. J. Williams. London: Butterworth & Co. 1959. 545 and (tables and index) 58 pp. 15s. 6d. net.

Introduction to Criminal Law. 4th edition by R. Cross and T. Jones. London: Butterworth & Co. 1959. 472 and (index) 35 pp. 35s. net.

The Enforcement of Morals. By Sir Patrick Devlin. Maccabaean Lecture in Jurisprudence of the British Academy 1959. Published for the British Academy by the Oxford University Press. 3s. 6d. net.

Crime Detection. By D. P. Brett. National Book League Readers' Guide. 3s. net.

Commander Burt of Scotland Yard. By L. Burt. London: Heinemann. 1959. 246 pp. 18s. net.

Attorney for the Damned. Edited by A. Weinburg. London: MacDonald. 1959. 546 and (index) 6 pp. 30s. net.

Readers' digest:

Children: Children under the criminal law: 103 *Solicitors Journal* 398.

Evidence: Cross-examination as to previous convictions: 227 *Law Times* 260.

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Books for review should be sent to the Publishers at the above address.

THE
CRIMINAL LAW
REVIEW

August 1959

Nottingham

On July 8 Captain Athelstan Popkess, C.B.E., Chief Constable of Nottingham City Police, was suspended from duty by the city's watch committee. The official minute of the watch committee meeting said that the suspension was on account of:

1. The Chief Constable's refusal to inform the committee about the inquiries by Scotland Yard officers into corporation matters in Nottingham;
2. The Town Clerk's report about the Chief Constable's conduct; and
3. The Chief Constable's statement that he proposed to ask for a public inquiry.

On July 9 the Permanent Under-Secretary of State for the Home Office wrote to the Town Clerk of Nottingham saying that the attention of the Home Secretary had been drawn to reports of the Chief Constable's suspension:

> "The Secretary of State would be glad if you would inform him without delay whether this is the case and if so on what grounds such action has been taken.
>
> "In view of suggestions in press reports that the Chief Constable was suspended following his refusal to furnish a report to the committee on investigations into alleged criminal offences, I am to add that—as the watch committee will of course be aware—the enforcement of the criminal law is a matter for the chief officer of police and that it is a well-established principle that he should not be subject to any interference or control by the police authority in carrying out his duty in that regard."

After further discussions and correspondence Captain Popkess was somewhat grudgingly reinstated with effect from August 9.

The expressed reluctance with which the reinstatement was made, and the expression of resentment at the Home Secretary's intervention have served only to call in question, not the impartiality of the Chief Constable, which the watch committee continue to doubt, but the impartiality of the watch committee.

It is quite intolerable that these events could ever have taken place. No chief constable should ever be so completely at the mercy of one political group. It is absurd that a chief officer of police should be able to be suspended for doing his duty. Fortunately such occurrences are rare, but under the present system of control of our borough police forces the same thing could happen again at any time.

It should be made clear to all watch committees that the Chief Constable is not their servant, a principle quite clearly decided in *Fisher* v. *Oldham Corporation.*[1] Appointed by watch committees, servants of the Crown and answerable to some extent to the Home Office which can refuse to be answerable to the House of Commons,[2] the position of Chief Constable needs a full examination. The Nottingham affair surely shows that it is time a system of administering the police were found which did not expose the chief officer of police to the idiosyncrasies of a tyrannical council, or vice versa.

In the absence of any Government action we welcome the news that "Justice," the British Section of the International Commission of Jurists, has decided to set up a special committee to study the problems involved in the administration of local police forces. Lord Shawcross, the chairman of "Justice," has agreed to preside over this committee.

We also welcome and indorse the resolution passed by the Nottinghamshire Law Society on August 6 which states:

"The Nottinghamshire Law Society, having noted Press Reports of the recent actions of the Nottingham City Council and its Watch Committee, which have given rise to fears that an attempt was being made to impede the administration of the criminal law, urges the Government to consider whether the present law safeguards the rights of citizens."

The reform of criminal procedure

We are pleased to note the Home Secretary's announcement in the House of Commons on July 30[3] that the Government intend to introduce legislation in the next session of Parliament to remedy various defects in present criminal procedure.

It is intended, first, to amend the law to enable an appeal to lie from the Divisional Court to the House of Lords in any criminal cause or matter including applications for habeas corpus and other prerogative orders, and appeals against decisions of the Divisional Court on cases stated by magistrates or quarter sessions, and against convictions for criminal contempt of court. It is proposed that appeals should only lie where a point of law of general public importance is involved.

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[1] [1930] 2 K.B. 364.

[2] See further [1959] Crim.L.R. 233.

[3] H.C. Vol. 609, col. 699.

Secondly, it is proposed to abolish the "certificate" procedure under section 1 (6) of the Criminal Appeal Act, 1907, and to provide for appeals from the Court of Criminal Appeal to be dealt with on the same basis as those from the Divisional Court.

The Howard League for Penal Reform

Mr. Hugh Klare who has been Secretary of the Howard League for Penal Reform since 1950 is to take up an appointment with the Council of Europe in connection with its programme of work in the field of criminology. The appointment is for two years in the first instance, and the League has granted Mr. Klare leave of absence for that period. His new duties at Strasbourg will begin on September 1, 1959.

Mrs. Derek Howard, who has been Assistant Secretary of the Howard League for two years, has been appointed Deputy Secretary and will take up her new duties on the same date.

Society for Forensic Science

With the object of forming a Society for Forensic Science, a meeting will be held on Saturday, October 31, 1959, in the Lecture Theatre, Portland Building, University of Nottingham. The Chairman at this meeting will be Dr. D. Patterson of the University of Leeds.

Copies of the circular containing preliminary information about the proposed society and registration forms for the inaugural meeting may be obtained from Stuart S. Kind, Esq., 18 Hall Lane, Harrogate, Yorkshire.

Judicial appointments

Harry Vincent Lloyd-Jones, Esq., Q.C., has been appointed a Commissioner of Assize on the Oxford Circuit (Hereford). Edward Brian Gibbens, Esq., has been appointed Recorder of the Borough of West Bromwich. Norman John Lee Brodrick, Esq., has been appointed Recorder of the Borough of Bridgwater. Hugh Eames Park, Esq., has been appointed Recorder of the Borough of Penzance. William Arnold Sime, Esq., M.B.E., Q.C., has been appointed Recorder of the Borough of Grantham.

Advance Notice of the Defence

By GLANVILLE WILLIAMS, LL.D., *Barrister-at-law*

Proposals to increase the advantages enjoyed by the defence are tepidly received by responsible police officers for an understandable if logically inadmissible reason. It is felt that the scales are already so tipped in favour of the defendant that any further reforms should not be conceived merely in his interest. One of the instances adduced to show a lack of balance in the present law is the rule whereby disclosure of evidence is completely one-sided. Counsel for the defence can prepare his cross-examination beforehand, when the trial is on indictment, because he has the depositions of the other side in front of him; but prosecuting counsel is deprived of this advantage, and is constantly liable to be taken by surprise at the trial.[1]

Evidence reserved by the defence until the trial can have great dramatic effect in discrediting the witnesses for the Crown, and for this reason the present law is beloved of barristers, who as a profession are more defence-minded than prosecution-minded. In the trial of Tony Mancini on a charge of murdering a woman by hitting her with a hammer, Dr. Roche Lynch, the senior Official Analyst to the Home Office, gave evidence for the Crown that Mancini's clothes were stained with human blood, which appeared to have been spurted on them from a distance, as though from a small artery. Mr. Norman Birkett, in cross-examining Dr. Lynch, first fixed him to his theory, bringing it out in full detail, and then intimated that he was in a position to prove that these clothes had not been bought by Mancini until after the woman's death.[2] The effect of this rebutting evidence was to eliminate this particular witness; but psychologically its effect was more damaging to the Crown's case than if the witness had merely been eliminated before the trial, by premature disclosure of this part of the defence. The jury would probably say to themselves: if this expert has been discredited in his theory, owing to the lucky circumstance that these clothes were not in the accused's possession at the material time, may not the other evidence for the Crown also be open to suspicion, even though its falsity cannot be so conclusively shown? There is no doubt, then, that from the point of view of the defence it pays to reserve evidence of this sort. At the same time, a strictly logical view would be that the elimination of one witness does not affect the credibility of other witnesses who are in no way connected with him. There would be no injustice to the defendant if he were required to disclose the rebutting evidence beforehand, thus giving the prosecution an opportunity to omit a piece of evidence which is clearly mistaken.

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[1] For a critical discussion of the rule, see Wigmore, *Evidence*, 3rd ed., vi, § 1848; also Orfield, *Criminal Procedure from Arrest to Appeal*, pp. 321–323. At the trial itself, the prosecution may see a defence coming from the nature of the cross-examinations conducted by the defending counsel, since it is a rule that he must put any contradiction to the opposing witness in order to give the witness an opportunity to state his version of the facts. When the prosecution are taken by surprise by the nature of the defence, they may call rebutting evidence (*Froggatt* (1910) 4 Cr.App.R. 115); but they must have the evidence available or get an adjournment, which they will usually be reluctant to ask for.

There is at least the possibility of one-sided surprise, also, in arguments on points of law. Whereas the prosecution will furnish to the defence beforehand a list of all the cases on which they propose to rely, the defending counsel need not disclose his own points of law. However, in practice the prosecution knows pretty well the points on which the defence will rely.

The greatest danger in the present law is that a manufactured defence will succeed because the prosecution are deprived of a proper opportunity to test it. The danger is well illustrated by a case[3] where a doctor gave evidence to support an alibi, and produced a patient's card which he said recorded a visit he had paid to the defendant's house on the date in question, when he saw the defendant at home. In some way the prosecution came to know of this evidence in sufficient time to call evidence to show that the card had not been printed until after the date of the alleged visit, so that the evidence was obviously fabricated. Had the defence been able to conceal the evidence until it was too late to rebut it, the alibi would probably have succeeded.

One must not exaggerate the frequency of defences of alibi, or the frequency with which they succeed. In fact the defence is comparatively rare, and when raised it usually fails. It is regarded with distrust by the court, for the simple reason that those who speak to it are generally friends or relatives of the accused. The price of this attitude is that a genuine alibi coming from biased persons is occasionally rejected because it fails to provide a convincing answer to evidence of identification which is in fact mistaken.

Without suggesting that it would make much practical difference to the administration of justice, it is submitted that the present rule should be changed to require advance notice to be given of the defence of alibi and of particulars relating to it. The police would then be able to investigate the defence before the trial. This rule would tend to discourage the fabricated alibi which is occasionally met with. Moreover, by reducing the number of fabricated defences, it might perhaps lead to more careful scrutiny of identification evidence where a defence of alibi is notified and is thought upon inquiry to be possibly true. Thus the suggested rule might tend not only towards the surer conviction of the guilty but also towards the surer acquittal of the innocent. At any rate, it would seem to serve these purposes better than the present one.

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[2] See Edgar Lustgarten, *Defender's Triumph* (London, 1951), 215.
[3] *Counsell, The Times*, July 16, 1957.

Lawyers' Ethics

The risk of a miscarriage of justice through surprise at the trial would be diminished if the notion of professional ethics currently entertained in the legal profession were a healthier one. The present attitude is represented by the following words of Glyn-Jones J. in a lecture to the Law Society.

"I have known cases in which the client supposes that his solicitor, by a demonstration of ferocity before the magistrates, can terrify them into not committing him for trial. I agree it has been known to happen, but it does not happen very often, and I want respectfully to commend to you the desirability of urging a client very strongly not to allow his guns to be unmasked . . . unless there is very strong reason to suppose that the attack will be successful and the case will go no further. How many times has counsel, when a brief has been delivered, lamented the fact that a promising line of defence has been ruined by the evidence brought out on the original examination which might never have been brought out if only the defence had kept quiet?"[4]

The layman never ceases to be puzzled by the question how a lawyer can reconcile it with his conscience to defend a client whom he knows to be guilty. The lawyer's answer invariably is that he does not know his client to be guilty, and there the discussion usually ends. But the point of the layman's attack would be expressed more accurately if he asked: how can the lawyer reconcile it with his conscience to *plan and conduct a defence on the assumption that his client is guilty*? The experience of the ages shows that it is necessary, to avoid miscarriages of justice, that the advocate should be able to assume the innocence of his client. But the advocate who assumes the guilt of his client, for the purpose of proving his innocence, is surely in a doubtful ethical position. In particular, a lawyer who deliberately keeps back till the last moment a defence of alibi, suspecting that it is manufactured and wishing to prevent the deception being exposed, makes himself from the moral point of view a party to the lie. He is no better than a doctor who deliberately produced a forged card for his patient.[5]

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[4] Mr. Justice Glyn-Jones, *Some Aspects of the Criminal Law* (Law Society, London, 1954), pp. 11–12. Similarly Cecil Whiteley, *Brief Life* (London, 1942), 92, quoted the opinion of Muir: if you have a substantial defence, the sooner the evidence is called to support it, the better. If, however, it is a destructive defence, reserve it for the trial. It is not clear whether an alibi is intended to be a substantial or a destructive defence, within this rule. Mr. Fraser Harrison, writing in [1955] Crim.L.R. 156, advised solicitors to reveal a defence of alibi at the preliminary inquiry only if it is so strong that the police investigation will not be able to shake it. He added that a defence of insanity will naturally be revealed, in order to enlist the co-operation and if possible support of the prison doctor. See to the same effect the same author's *Advocacy at Petty Sessions* (London, 1956), 22–23.

Early Disclosure of the Defence

There are two factors that may induce a defendant to disclose his defence at the preliminary inquiry, or otherwise before the trial. Where he is without means and intends to ask for legal aid, it is an advantage for him to disclose the line that his defence will take, if not by evidence in chief, then by cross-examination of the Crown witnesses at the preliminary inquiry, because the magistrates are entitled to consider the possibility of a defence in deciding whether legal aid shall be granted.

The second practical consideration is that the judge may comment at the trial upon the failure of the accused to disclose his defence at a time when it could be tested. At first the Court of Criminal Appeal took the view that such a comment was improper, because the statutory caution administered by the justices at the preliminary inquiry expressly told the accused that he was not bound to make a statement, and this caution would be misleading if the failure to make early defence could be made a matter of comment at the trial. Later, however, the Court of Criminal Appeal in effect reversed its earlier view, holding that the trial judge might properly comment upon the accused's failure to state and give particulars of his defence of alibi at the preliminary hearing or otherwise before the trial, which failure had the effect of depriving the prosecution of an opportunity of making their own inquiries to test the truth of the defence.[6] Hence it now calls for a nice exercise of judgment on the part of defending counsel whether to advise his client to reserve his defence, and so risk an adverse comment from the judge, or whether to advise him to disclose it, and so risk a destruction of the defence by further investigations made by the police. Unless the defence is a strong one, most defending counsel would probably choose the former course, on the ground that the summing-up is likely to lean against the accused anyway, so that one more adverse comment will not make much difference.

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[5] Another illustration of the English attitude is the lawyer's practice of telling his client to say nothing to the police. This advice follows naturally from the fact that the lawyer assumes his client to be guilty. I was told in Sweden that a Swedish advocate would advise his client to tell the police everything, conducting the defence on the assumption of innocence, not of guilt.

It may be mentioned here that the present judicial practice contains the possibility of injustice for a defendant who is unrepresented at the preliminary inquiry, because the statutory caution administered by the magistrates may seem to the layman like advice to hold his tongue. The person who is in the greatest danger of unjust conviction is a member of the criminal classes who, for once, has been wrongly accused; and he is the very type of person to distrust the police and believe that it pays best to tell them nothing. As Mr. C. H. Rolph has put it, " an official system that can produce this tissue of false accusations against you is capable (you may genuinely believe) of getting at your witnesses if it knows who they are; and some of them are perhaps criminals enjoying a precarious liberty that the police are in a position to terminate at any moment." [7]

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[6] *Littleboy* [1934] 2 K.B. 408 (C.C.A.). The contrary had been ruled in *Naylor* [1933] 1 K.B. 685 (C.C.A.: see fuller report in 23 Cr.App.R. 177), but that was distinguished in *Littleboy* as merely an instance of the rule that the accused's silence is not corroboration of the evidence against him of an accomplice. The rule in *Naylor* had already been abandoned on special facts in *Parker* (1932) 24 Cr.App.R. 2. Even under the rule in *Littleboy*, if the judge comments upon the supposed failure by the accused to give notice of his defence of alibi, and the comment is mistaken, because in fact the accused gave notice of it to the prosecution after the preliminary inquiry, the comment will be a misdirection: *Dawkins* (1942) 28 Cr.App. R. 151. Also, the judge should not treat the accused's silence upon being cautioned as evidence of guilt: *Leckey* [1944] K.B. 80 (C.C.A.); *Haddy, ibid.* 442 (C.C.A.).

[7] C. H. Rolph, *Personal Identity* (London, 1957), 121–122.

There is a danger that a judge's comment to the jury on the failure of the accused to give early intimation of his defence may sometimes be undeserved for a different reason. It is a rule of the law of evidence that statements by the accused before the trial supporting his own case are inadmissible, except to a limited extent under the *res gestae* rule. Therefore, it will not normally come out in evidence that the accused has stuck to the same story throughout. For the possible injustice, see Gooderson in [1957] Camb.L.J. at 67–68. It is, however, the practice of the police to state what the accused said when arrested, whether this tells for or against him.

Insanity

Another defence which calls for some discussion is that of insanity. There is no obligation upon the defending counsel to give advance notice of this, and theoretically the prosecution could find themselves faced at the trial with expert evidence which they have not come prepared to rebut. This rarely, if ever, happens, because it is usually apparent from the state of the case before it comes to court that there may be a defence of insanity. The police generally inform the magistrates at the preliminary hearing that there is "a mental history," and in such circumstances the magistrates will commonly suggest, on committal, that a medical report be provided and made available for the defence. It might, however, save the prosecution some trouble and expense if they knew for certain in advance of the trial whether the defence of insanity (or of diminished responsibility) were to be raised or not.

Other Systems

The English rule allowing the defendant to take the prosecution more or less by surprise is a matter of comment to the Continental observer, under whose system such surprise is generally eliminated. In France, for example, there is no rule that the accused *must* disclose his defence, for he is allowed to give evidence at the trial which has not been communicated to the *juge d'instruction*. But in practice there is usually a disclosure, because the *juge d'instruction* can often be persuaded to dismiss the case. Moreover, it is hard for the accused to keep the nature of his defence secret when he is under interrogation by the *juge d'instruction*: and he is required to communicate to the prosecution a list of his witnesses at least twenty-four hours before the trial. In Scotland the law is more precise: the accused must notify beforehand to the prosecution any special defence such as alibi, self-defence and insanity.[8] In addition, he must give three days' notice of the names of his witnesses unless he shows that he was unable to do this, and in the latter case the trial may be adjourned.[9]

In the United States, the Model Code of Criminal Procedure proposed by the American Law Institute, which has been adopted in some jurisdictions, provides that notice must be given of intention to claim the defence of insanity or to establish an alibi.[10]

It may be thought from this review that the English practice does not work so badly as might, on general grounds, be feared.

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[8] Macdonald, *The Criminal Law of Scotland*, 5th ed., 265.

[9] Criminal Procedure (Scotland) Act, 1887, s. 36; see (1943) 7 J.Cr.L. 292.

[10] See 50 Yale L.J. 113–114.

Nevertheless, it is capable of improvement. Any of four requirements might be imposed on the accused: to give notice of a special defence, to give lists of witnesses, to allow inspection of documents, and to give the prosecution copies of the defence witnesses' proofs of evidence. The first requirement in itself would be of little assistance to the prosecution: in particular it does not help to know that a defence of alibi will be set up, unless the prosecution is supplied at least with the names of the defence witnesses. But there is not much point in entering into the details of reform until agreement is reached on the fundamental issue: whether the criminal trial is in the nature of a game or sporting contest, or whether it is a serious inquiry aiming to distinguish between guilt and innocence.

R. v. Cowburn [1]

By J. D. J. HAVARD, M.A., LL.B., M.B., *Barrister-at-law*

Two interesting points arise out of this case. First the reference by the Lord Chief Justice to the possibility of some hope for this type of case when the Mental Health Bill becomes law. At the time of writing the Mental Health Bill provides that if a person has been convicted of an offence, the sentence for which is not fixed by law (*e.g.*, murder reduced to manslaughter on a successful defence of diminished responsibility) and the court is satisfied on the evidence of two medical practitioners (at least one of whom must be recognised by the local health authority as having special experience in the diagnosis and treatment of mental disorders) that he is suffering from mental illness, psychopathic disorder, subnormality, or severe subnormality of a kind which is amenable for hospital treatment, the court, on conviction may authorise his detention in hospital if, having regard to all the circumstances, it considers this the most suitable method of dealing with the case.

At present the courts have no power to send persons to hospital except under the Mental Deficiency Act, 1913, s. 8, which operates only where the person is mentally defective. It remains to be seen whether the courts will exercise their new powers under the Mental Health Bill, at any rate in the case of bad security risks. Hence in *Speake*,[2] the judge refused to exercise his powers under the Mental Deficiency Act to send the prisoner, who was just on the certifiable side of the border of feeblemindedness, to hospital, and sentenced him instead to imprisonment for life. The prisoner had been tried for the murder of a young boy whom he had lured to a lonely spot, indecently assaulted, and then brutally battered to death. The Court of Criminal Appeal refused to interfere with the sentence on the grounds that section 8 of the Mental Deficiency Act, 1913, was merely permissive. The Mental Deficiency Act operates only in cases of non-capital offences, and it follows that the defence of diminished responsibility has brought within the section many cases which would otherwise not have qualified. In *Speake* the prisoner had been successful in a defence of diminished responsibility, and if sent to hospital by order of the court under the Mental Deficiency Act he would have become subject to the general law relating to mental defectives so that the consent of the Secretary of State would not be required before discharge from hospital. No doubt the judge felt that the prisoner was a bad security risk and there was some danger of premature discharge from hospital.

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[1] See p. 590, *post*.

[2] [1957] Crim.L.R. 683.

The Mental Health Bill originally provided that prisoners sent for treatment to hospital under a Restriction Order could not be released without permission of the Home Secretary. This has now been somewhat qualified as the Minister of Health stated during the third reading [3] that a new provision will be inserted which will permit patients subject to restriction under order of the courts to require the Home Secretary to take the advice of the Mental Health Tribunal on fitness for discharge at the end of the first year in hospital and subsequently at the intervals at which they would be entitled to apply if they were not subject to a Restriction Order, *i.e.*, they are to be placed in the same position as ordinary patients.

Another interesting aspect of this case is the refusal of the Court of Criminal Appeal to give any direction on the legality of voluntary castration. The disposal of the over-sexed aggressive psychopath who is subject to uncontrollable sexual impulses is a very difficult problem. The Scandinavian experience has shown that voluntary castration is particularly efficacious in these cases and may permit an early rehabilitation in the community. Between 1929 and 1954, 723 sexual criminals were subjected to the operation in Denmark and there has been a relapse rate of only 1 per cent. into the homologous sexual crime.[4]

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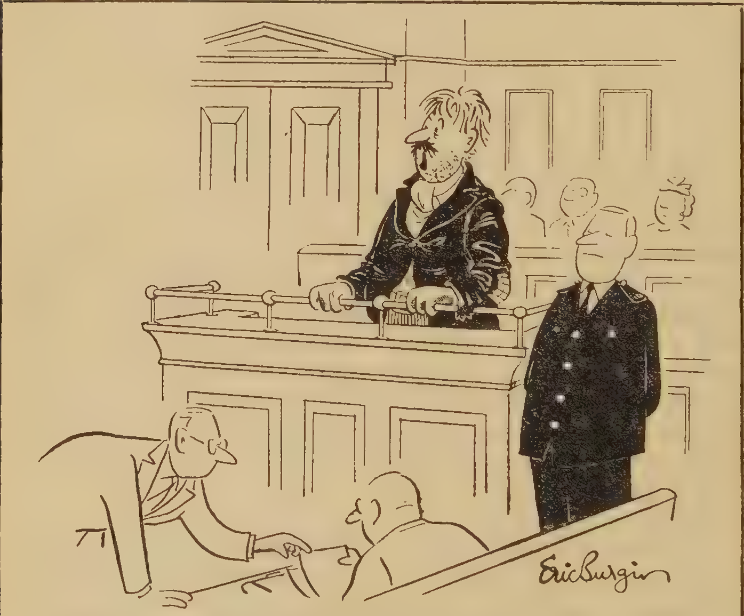
[3] H.C. Vol. 604, col. 405.

[4] See Gormsen, H. (1954) Med.-Leg.J. 22, 46.

In view of the futility of sentencing such individuals to fixed terms of imprisonment, following which they must be released to perpetrate fresh outrages on the community, it is to be hoped that the courts will freely exercise their new powers under the Mental Health Bill in order to ensure that proper treatment can be given, and that some direction will be given on the legality of voluntary castration.

(For a discussion of the present legal position with regard to voluntary castration, see Glanville Williams, *The Sanctity of Life and the Criminal Law*, pp. 101 *et seq.*)



"Just ask yourself, your worship — do I look the sort of bloke wot would pinch three dozen bars of toilet soap?"

The Onus of Proof in Cases of Murder

By G. H. L. FRIDMAN, M.A., B.C.L., LL.M., *Barrister-at-law*
Lecturer in Law, University of Sheffield

Almost twenty-five years ago, in *Woolmington* v. *Director of Public Prosecutions*,[1] the House of Lords, surprisingly enough for the first time, elucidated what was the correct approach to the question of proof in trials for murder. It is curious, now, to reflect that as late as 1935 it was possible for juries to be directed that, once the prosecution proved that the deceased had met his death by the act of the accused, this would raise the inference that the accused had acted " maliciously," *i.e.*, with the requisite state of mind for the crime of murder. Yet the authority for such an approach was eminent and apparently incontrovertible. For it rested upon statements by Foster [2] and Lord Chief Justice Tindal in *R.* v. *Greenacre* [3] (which like *Woolmington's* case involved the defence of accident), as well as some ancient, if doubtful, or badly reported cases.[4] However, the House of Lords, without much difficulty, showed that to accept such an approach was dangerous and invalid.

First of all, it was invalid because it rested upon confusion about the word " onus " in the phrase " onus of proof ": for that word had been used " indifferently throughout the books, sometimes meaning the next move or next step in the process of proving, or sometimes the conclusion of the whole matter." [5] Hence the way the word " onus " was employed resulted in the confusion of what Dr. Glanville Williams [6] calls the two meanings of burden of proof. One is, "the risk of not persuading the jury" (which may be called the *persuasive burden* [7]): the other is the duty of going forward with evidence to satisfy the judge (which Dr. Williams calls the *evidential burden* [8]). The persuasive burden was upon the prosecution. "Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt. . . . If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal." [9] But the evidential burden, as will shortly be seen, could be upon the accused.

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[1] [1935] A.C. 462, which was recently stated by an Australian judge to have made a great impact on English criminal law: *R.* v. *Bonner* [1957] Victorian Law Reports 227 at p. 234, *per* Gavan Duffy J.

[2] *Crown Law* (1762) at p. 255. " In every charge of murder, the fact of killing being first proved, all the circumstances of the accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence produced against him: for the law presumeth the fact to have been founded in malice, unless the contrary appeareth. . . ."

[3] (1837) 8 C. & P. 35 at p. 42 where, in summing up, Tindal C.J. said: " where it appears that one person's death has been occasioned by the hand of another, it behoves that other to show from evidence or by inference from the circumstances of the case, that the offence is of a mitigated character, and does not amount to the crime of murder."

[4] *Mackallay's Case* (1611) 9 Co.Rep. 65b; *R.* v. *Legg* (1764) Kelyng 27.

[5] *Woolmington* [1935] A.C. at p. 479.

Secondly, it was dangerous, because to admit that the prisoner must prove that he was innocent would mean to take the decision of the case out of the hands of the jury and make the guilt of the accused a matter for the judge.

> "If at any period of a trial it was permissible for the judge to rule that the prosecution had established its case and that the onus was shifted on the prisoner to prove that he was not guilty and that unless he discharged that onus the prosecution was entitled to succeed, it would be enabling the judge in such a case to say that the jury must in law find the prisoner guilty, which is not the common law." [10]

Thus the House of Lords made it quite clear that in cases of murder the law as to onus of proof was exactly the same as in cases of receiving,[11] and of shooting which did not result in death [12]: namely that the onus of proof is imposed upon the prosecution of satisfying the jury beyond reasonable doubt of the prisoner's guilt. "That onus never changes, it always rests on the prosecution." [13]

However, what has been referred to above as the evidential burden is treated by the law in a different manner from the persuasive burden. Moreover, in *Woolmington* itself there are indications that even the persuasive burden is not always on the prosecution: for reference is made [14] to the burden of proving insanity, as well as to (unspecified) statutory exemptions to the principle that it is the prosecutor's duty to prove the prisoner's guilt, in language which clearly shows that there are some matters the proof of which is upon the accused. But the question is: to what extent is such proof upon the accused? Another question is: when does the evidential burden shift? The way these questions have been dealt with in cases since *Woolmington* is the subject of this article.

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[6] *Criminal Law: The General Part*, pp. 691–695.

[7] As it is by Dr. Williams *op. cit.* at pp. 353, 701.

[8] *Ibid.*, at p. 695.

[9] *Woolmington* [1935] A.C. at p. 481.

[10] *Ibid.*, at p. 480.

[11] *R.* v. *Schama & Abramovitch* (1914) 11 Cr.App.R. 45.

[12] *R.* v. *Davies* (1913) 8 Cr.App.R. 211.

[13] *Schama* (1914) 11 Cr.App.R. at p. 49, *per* Lord Reading C.J.

There are several matters which particularly call for discussion: insanity; diminished responsibility; self-defence; and accident.

Insanity

Viscount Sankey L.C. in *Woolmington* [15] pointed out that the defence of insanity was an exception to the general rule laid down in that case. Referring to *R.* v. *M'Naughten* [16] (the *fons et origo* of the law of insanity in crime until the Homicide Act, 1957, of which more will be said later), he said:

> "It is quite exceptional and has nothing to do with the present circumstances. In *M'Naughten's* case the onus is definitely and exceptionally placed upon the accused to establish such a defence."

The effect of *M'Naughten's* case on the question of the onus of proof was summarised thus by Lord Reading C.J. in *R.* v. *Perry* [17]:

> "Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts unless the contrary is proved. To establish insanity it must be clearly proved that at the time of committing the act the party is labouring under such a defect of reason as not to know the nature and quality of the act which he is committing . . . or . . . that he does not know that he is doing wrong."

The effect of this is illustrated by an early case, *R.* v. *Richards*.[18] The evidence of insanity offered by the defendant to a charge of murder was that she had once made an attempt to drown herself. A medical witness testified that she was suffering from a mental disease which would subject her to paroxysms or fits of madness. Crowder J., summing up to the jury, said that if the defendant were in a state of mind in which she might have destroyed herself as she formerly attempted, they might probably think that she could not be responsible for her acts: "but the onus of proof as to this lies upon her."

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[14] *Woolmington* [1935] A.C. at pp. 475, 481.

[15] *Ibid.*, at p. 481.

[16] (1843) 4 St.Tr.(N.S.) 847.

[17] (1919) 14 Cr.App.R. 48 at pp. 54–55.

[18] (1858) 1 F. & F. 87: the woman was found not guilty.

Clearly this means that evidence must be tendered by the accused to prove insanity. But before *Woolmington* the courts were chary of going into too much detail on the question of how much evidence was required: that is to say, what exactly was the onus on the accused. Thus in *R.* v. *Oliver Smith* [19] counsel in argument said:

> "The question is, is it right or is it not, where there is some suggestion of insanity, for counsel for the Crown to ask for a ruling as to whether or not there is evidence of insanity to go to the jury."

But the Court of Criminal Appeal refused to be drawn, and stated that the only general rule that could be laid down was that insanity, if relied upon as a defence, must be established by the defendant. Again in *R.* v. *Perry*,[20] where the defendant called evidence to show that he suffered from epileptic fits, it was said that to establish that was only one step: it had also to be shown that the man was suffering from an epileptic seizure at the time when he committed murder (which was not proved in that case). That case only illustrates and underlines the requirements of *M'Naughten's* case, that the accused must prove that, "at the time of committing the act," the relevant state of mind (*i.e.*, insanity) was present. But it does not clarify the real nature of the onus on the accused.

The question is whether the accused's onus in respect of insanity is a persuasive burden or an evidential one. Lord Sankey in *Woolmington* seems to have suggested that, although the onus of proving guilt was usually on the prosecution where insanity was set up as a defence, the onus passed to the accused, *i.e.*, the burden was persuasive. In later cases, the Judicial Committee of the Privy Council [21] and the Court of Criminal Appeal [22] said that the onus on the defendant of proving insanity was not the same as the onus on the prosecution of proving guilt. The accused merely had to establish a balance of probability (the onus said to apply in civil cases), not to overcome any reasonable doubt (the criminal test).[23] This indicates that if the accused can adduce evidence tending to show that he was probably insane at the material time, he will be entitled to succeed in his defence.

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[19] (1910) 6 Cr.App.R. 19.

[20] (1919) 14 Cr.App.R. 48 at p. 55.

[21] *Sodeman* v. *R.* [1936] 2 All E.R. 1138, affirming the decision of the High Court of Australia: 55 C.L.R. 192 at p. 228.

[22] *Obiter* in *R.* v. *Carr-Briant* [1943] K.B. 607, at pp. 610–611.

[23] On the whole subject see Fridman, "Standards of Proof" (1955) 133 Can. B.R. 665.

There are two ways of interpreting this. For it can be said that the persuasive burden originally on the prosecution has shifted to the defence—and taken on a new meaning, *i.e.*, " balance of probability " instead of " beyond reasonable doubt." Or it can be said that the persuasive burden has always remained on the prosecution but the evidential burden has shifted to the accused, and once evidence of insanity has been introduced it may be of sufficient cogency to give rise to a " reasonable doubt " about the accused's sanity, the benefit of which should be given him, thereby entitling him to a verdict of " guilty, but insane."

This latter is the view preferred by Dr. Glanville Williams.[24] He criticises Lord Sankey's opinion in *Woolmington* on the ground that the M'Naughten Rules " must be read subject to the rule that the burden of proof of *mens rea* is on the Crown. Insanity is not an exception to that principle: on the contrary, it is that principle that is an exception to the rule in insanity cases that the burden of proof of insanity is on the accused." [25]

But this, with all respect, seems to turn the law inside out. For it is clear from the cases, that the persuasive burden of proving insanity is on the accused. In *Mancini* v. *D. P. P.*,[26] Lord Simon L.C., after referring to the rule that the prosecution must prove the charge beyond reasonable doubt, said that it was of general application in all charges within the criminal law, the only exception being " in the defence of insanity and in offences where onus of proof is specially dealt with by Statute." [27] In *Chan Kau* v. *R.*[28] Lord Tucker, delivering the opinion of the Judicial Committee, said that the onus was never on the accused to establish " any . . . defence apart from that of insanity." His Lordship went on to say that the rule with regard to onus of proof in cases of murder and manslaughter is of general application, and permits of no exception *save only in the case of insanity, which is not strictly a defence.* More recently, in *R.* v. *Lobell*,[29] the Court of Criminal Appeal said that " the rule that the onus is on the prosecution permits of no exception except as to proof of insanity."

It is probable that this was a deliberate matter of policy on the part of the law. For the presumption of innocence, to be truly realistic and satisfactory as a governing principle, had to be fitted in with the presumption of sanity. Had the latter presumption been determined to be rebuttable only by proof " beyond reasonable doubt," the criminal law might have developed into too harsh a system, particularly in the light of the strictness of the M'Naughten Rules. Hence, possibly, the development of the rule that the burden on the accused of proving insanity is not as great as that on the prosecution in respect of guilt. It is the development of this rule that provides the answer, it is suggested, to Dr. Williams's arguments. For it is not necessary to argue that the burden on the accused is merely evidential in order to safeguard the accused. Nor is it necessary to refuse to admit that the proof of insanity involves an exception to the general principle that prevails in the criminal law. The interests of the accused are safeguarded by the interpretation placed by the courts on the kind of persuasive burden placed on the accused.[30]

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[24] *Op. cit.*, at pp. 352–353.

[25] *Ibid.*, at p. 355.

[26] [1942] A.C. 1 at p. 11.

[27] *e.g., R.* v. *Carr-Briant* [1943] K.B. 607, where it was pointed out that the burden on the accused, as in the case of insanity, was less than that on the prosecution: see also *R.* v. *Dunbar* (discussed below).

[28] [1955] A.C. 206 at p. 211.

[29] [1957] 1 Q.B. 547 at p. 530.

Diminished responsibility

The Homicide Act, 1957,[31] introduced the defence of diminished responsibility to a charge of murder and enacted[32] that on a charge of murder it shall be for the defence to prove that the person charged, by virtue of the section, is not liable to be convicted of murder. This provision of the law was considered by the Court of Criminal Appeal in *R.* v. *Dunbar*.[33] There the trial judge, Ashworth J., directed the jury that " fairly and squarely the burden is placed on the defence." But it was held that the learned judge had not adequately instructed the jury as to the difference between the onus on the prosecution and the onus on the defence. According to *R.* v. *Carr-Briant*, which was binding on the court, but had not been cited at the trial:

> " . . . where either by statute or at common law some matter is presumed against an accused person unless the contrary is proved the jury should be directed that it is for them to decide that the contrary is proved and that the burden of proof

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[30] In this respect it is worthwhile noting that, when dealing with statutory exceptions to the *Woolmington* principle, Dr. Glanville Williams admits that their effect is to place the persuasive burden on the accused (though it is less than that on the prosecution): but he thinks that such legislation should be rewritten so as to make it refer to the evidential burden: *op. cit.*, at pp. 707–709. Is this then merely an argument about the use of certain words in a certain context?

[31] 5 & 6 Eliz. 2, c. 11, s. 2.

[32] *Ibid.*, s. 2 (2).

[33] [1958] 1 Q.B. 1.

> required is less than that required at the hands of the prosecution in proving the case beyond a reasonable doubt and that this burden may be discharged by evidence satisfying the jury of the probability of that of which the accused is called on to establish." [34]

This had been done, for a psychiatrist was called for the defence and he said that the prisoner was a psychopath and was suffering from an abnormality of the mind. After this opinion had been contradicted by the prison doctors, it was held that the failure by the judge adequately to direct the jury made it undesirable to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907.

This case, it is suggested, endorses what was said above on the subject of insanity: for diminished responsibility and insanity can be considered to be *ejusdem generis*, and the language of the statute was no doubt intended to put diminished responsibility in the same position as a defence as insanity was by virtue of the cases already cited.

Further light on the position is afforded by the case of *R.* v. *Bastian.*[35] There the defence introduced evidence of diminished responsibility and the prosecution wanted to cross-examine the defendant's witnesses, and call other witnesses, to establish that the defendant's mental state was more than one of diminished responsibility and amounted to insanity. This was permitted by Donovan J. who added, after the defendant had been convicted of manslaughter (not found guilty but insane), that in circumstances like those of the case before him it would be proper to direct the jury that it was for the prosecution to satisfy the jury that the state of the accused's mind went beyond what the defence contended and amounted to insanity. This would seem to mean that in such cases the persuasive burden shifts, backwards and forwards between prosecution and defence. But presumably the defence which seeks a verdict of manslaughter need only show diminished responsibility on a balance of probabilities, whereas the prosecution, which wants to prove the accused insane, so as to get a verdict of *guilty* but insane, must prove its case according to the *Woolmington* principle. Therefore, if there is any reasonable doubt as to the insanity of the accused, but he is probably not sane, *i.e.*, his mental responsibility is "substantially impaired," as the Homicide Act says, then the accused is entitled to the benefit of the doubt in the one respect, and the benefit of the probability in the other.

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[34] *Ibid.*, at pp. 10–11.

[35] [1958] 1 All E.R. 568n.

Provocation

An early instance of the application in *Woolmington* to the defence of provocation was *R.* v. *Prince*.[36] The accused claimed that he had killed the deceased (by inflicting "horrible wounds"[37] on him with an axe) because the latter had made an indecent suggestion to him.[38] The trial judge directed the jury that if they thought the provocation received was sufficient to deprive a reasonable man of his self-control, so as to cause him, a reasonable man, to use the violence that was used, they could reduce the crime to manslaughter. The Court of Criminal Appeal came to the conclusion that, in the light of *Woolmington*, a proper direction had not been given. It was insufficient having regard to the absence of any direction that, if upon a review of all the evidence, the jury were left in reasonable doubt whether, even if the accused's explanation were not accepted, the act was provoked, the accused was entitled to be acquitted of murder.

This case was explained in *Mancini* v. *D. P. P.*[39] as being one in which the jury were not adequately directed that reasonable doubt whether provocation existed, as opposed to confident assurance that it did, was sufficient to require the milder view to be taken. *Mancini's* case, indeed, did much to clarify the law on provocation—which had not been expressly dealt with in *Woolmington*.

Mancini, like many of these provocation cases,[40] concerned a killing which occurred in the course of a fight. Both self-defence and provocation were raised as defences. So far as the latter defence was concerned, the House of Lords (after discussing in detail the requirements for provocation) considered that there was not sufficient evidence to support it. But their Lordships also discussed how the burden of proof of provocation should be dealt with: and various passages in the speech of Lord Simon L.C. (the only one given) indicate that the onus is on the accused to introduce evidence which might induce a reasonable doubt in the minds of the jury. Thus, at one point,[41] his Lordship said:

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[36] (1941) 28 Cr.App.R. 60: qualified by Dr. Glanville Williams (*op. cit.*, at p. 704, note 6) but referred to with approval by the court in *R.* v. *McPherson* (1957) 41 Cr.App.R. 213 at p. 217.

[37] 28 Cr.App.R. at p. 62, *per* Lord Caldecote C.J.

[38] *Cf.* the more recent case of *R.* v. *McCarthy* [1954] 2 Q.B. 105: where, on a similar suggestion being made, the accused struck the deceased violently, and it was held that provocation could not be pleaded successfully, since the violence used was not commensurate with the provocation.

[39] [1942] A.C. 1 at pp. 12–13.

[40] *Cf.* the earlier case of *R.* v. *Hall* (1928) 21 Cr.App.R. 48 where the verdict of murder was quashed because the defence of provocation was not submitted to the jury for their consideration.

[41] [1942] A.C. 1 at p. 8.

> "The possibility of a verdict of manslaughter instead of murder only arises when the evidence given before the jury is such as might satisfy them as the judges of fact that the elements were present which would reduce the crime to manslaughter, or at any rate might induce a reasonable doubt whether this was, or was not, the case."

There is thus an evidential burden on the accused to introduce evidence of provocation such as will raise a reasonable doubt in their minds, and if the jury

> "are left in reasonable doubt whether the act was 'provoked' . . . the prisoner should be found guilty of manslaughter." [42]

That this is an evidential and not a persuasive burden, seems to follow from the acceptance of the idea by Lord Simon that the accused does not have to prove a good defence of provocation, even on the balance of probabilities: all the accused must do is to introduce evidence which raises a reasonable doubt whether he killed intentionally, without being provoked. It was seen above that Dr. Glanville Williams has agreed that this is equally so with the defence of insanity. But the difference between insanity (and now diminished responsibility) and provocation is this.

Provocation (like the other pleas to be dealt with later in this article) is a real defence: it is an answer to a charge of murder—even though not a complete answer since it "goes only to a mitigation of the offence." [43] Its effect is to counteract the prosecution's allegation that the killing was "malicious." The burden of proving that the killing was "malicious" is always on the prosecution: therefore a plea of provocation by the accused ought not to diminish the task of the prosecution. That still remains as it was: namely, to prove the charge beyond reasonable doubt. Hence the accused is not obliged to prove provocation in order to answer the prosecution's allegation. He has only to introduce a reasonable doubt, *i.e.*, to produce evidence which will have that effect. Insanity, on the other hand, "is not strictly a defence." [44] It is really a special plea which does not deny the killing was murder, but does provide an exemption from full responsibility. Whereas the effect of provocation (and the other pleas) is to deny that the accused was guilty of murder, the plea of insanity does not affect the issue of *guilt* at all, in the strict sense: it only deals with what responsibility the accused shall bear for his guilty act. Hence it is neither unreasonable nor illogical to place a fuller burden on the accused where he pleads insanity,[45] while putting the lighter burden on the accused who pleads provocation, or some other plea.

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[42] *Ibid.*, at p. 13.

[43] *R.* v. *Lobell* [1957] 1 Q.B. 547 at p. 551, *per* Lord Goddard C.J.

[44] *Chan Kau* v. *R.* [1935] A.C. 206 at p. 211, *per* Lord Tucker: the same would appear to be true of diminished responsibility.

This is made clear by what Lord Goddard said in delivering the opinion of the Judicial Committee in *Kwaku Mensah* v. *R.*[46] :

> " . . . on an indictment for murder it is open to a jury to find a verdict of either murder or manslaughter, *but the onus is always on the prosecution to prove that the offence amounts to murder if that verdict is sought.* If on the whole of the evidence there is nothing which could entitle a jury to return the lesser verdict the judge is not bound to leave it to them to find murder or manslaughter. But if there is any such evidence then, whether the defence have relied on it or not, the judge must bring it to the attention of the jury, *because if they accept it or are left in any doubt about it the prosecution have not proved affirmatively a case of murder.*"

More recently, in *R.* v. *McPherson*[47] Lord Goddard reiterated, in different words, the same point. After quoting from the judgment in *R.* v. *Lobell*[48] (a case of self-defence) his Lordship said[49]:

> " . . . the jury must be reminded that the onus remains throughout on the prosecution, and therefore if they are left in doubt whether or not the facts show sufficient provocation to reduce the killing to manslaughter, that issue must be determined in favour of the prisoner."

In most cases, of course, the accused will bring evidence to show that he was provoked, and that he acted under the influence of that provocation. But there may be cases in which the prosecution open facts which of themselves would show provocation, and then

> " it would clearly be for the prosecution to destroy these facts or prove other facts which would show a jury that there was not provocation in the case to reduce the offence from murder to manslaughter."[50]

A final point on the question of provocation is that raised by the opinion of the Judicial Committee in the recent case of *Bullard* v. *R.*[51] This deals with the interrelation of the defences of provocation and self-defence. Some of the language used by Lord Simon about the facts in *Mancini*[52] seemed to suggest that the same evidence adduced in support of an unsuccessful defence of self-defence can never be relied upon in whole or in part as affording provocation sufficient to reduce the crime from murder to manslaughter. This the Judicial Committee rejected, for "Conduct which cannot justify may well excuse."[53]

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[45] Subject to what was said above as to the *standard* of proof required.
[46] [1946] A.C. 83 at p. 92: italics mine.
[47] (1957) 41 Cr.App.R. 213.
[48] [1957] 1 Q.B. 547: discussed below.
[49] (1957) 41 Cr.App.R. 213 at p. 217: see also *ibid.*, at p. 215.
[50] *McPherson* (1957) 41 Cr.App.R. 213 at p. 215.
[51] [1957] A.C. 635. There was no misdirection on the subject of onus: but the failure to leave provocation to the jury means that the verdict of manslaughter should be substituted for that of murder.

Self-defence

The application of the foregoing rules to cases where self-defence is pleaded was made quite clear by the Judicial Committee in *Chan Kau* v. *R.*[54] There it was said by Lord Tucker[55] that, in cases where the evidence discloses a possible defence of self-defence, the onus remains throughout upon the prosecution to establish that the accused is guilty of the crime of murder, and the onus is never upon the accused to establish this defence, any more than provocation, or any other defence, apart from insanity.[56]

But the nineteenth-century case of *R.* v. *Smith*[57] contained a passage in the summing-up of Bosanquet J. where, dealing with the defence of self-defence, it was said[58]: "Before a person can avail himself of that defence, he must satisfy the jury that that defence was necessary." This would seem to put the *persuasive* burden of proving self-defence upon the accused. But, as Lord Tucker said, in *Chan Kau*,[59] that statement of the law needed some modification in the light of modern decisions—namely *Woolmington* and *Mancini*.

Curiously enough, however, in a more recent case (not of murder but of wounding with intent to do grievous bodily harm) *R.* v. *Lobell*,[60] where self-defence was raised by the accused, the trial judge still directed the jury that it was for the defence to establish to their satisfaction his plea of self-defence. Although this was not a case of murder, the Court of Criminal Appeal applied the rule applicable in murder and stated by Lord Tucker in *Chan Kau*. But, in the course of the judgment, the court made some very valuable statements of the law applicable, which may be summarised thus:

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[52] [1942] A.C. 1 at p. 9, quoted in *Bullard* (*infra*) at p. 643.

[53] *Bullard* [1957] A.C. 635, at p. 643, *per* Lord Tucker.

[54] [1955] A.C. 206.

[55] *Ibid.*, at p. 211: referring to a Scottish case (*H.M. Advocate* v. *Doherty* 1954 S.L.T. 169) and a Canadian one (*Latour* v. *R.* [1951] 1 D.L.R. 834) which make the same point.

[56] As to which, see above.

[57] (1837) 8 C. & P. 160.

[58] *Ibid.*, at p. 162. It was suggested by Lord Goddard in *Lobell* (below n. 60) at p. 550, that this was based on the statutory provision that no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune, or in his own defence, or in any other manner without felony: see Offences against the Person Act, 1861, s. 7.

[59] [1955] A.C. 206 at p. 212.

[60] [1957] 1 Q.B. 547.

1. The onus remains on the prosecution throughout, but this does not mean that the prosecution need adduce evidence rebutting self-defence *before* (or even after) that defence is raised.
2. The defendant must introduce some evidence from which the jury could be entitled to find the issue in his favour: (unless the prosecution's evidence can be used for that purpose).
3. But to say that the defendant must introduce such evidence is very different from saying that the onus is on the defence.[61]
4. The jury must come to a verdict on all the evidence laid before them: and if on a consideration of the evidence the jury are left in doubt [62] whether the killing or wounding was or was not in self-defence the proper verdict is not guilty.
5. A convenient way of directing the jury is to tell them that the burden of establishing guilt is on the prosecution, but they need also consider the evidence for the defence, which may have one of three results:
    (i) it may convince them of the guilt of the accused;
    (ii) it may cause them to doubt—in which case the defendant is entitled to an acquittal;
    (iii) it may, and sometimes does strengthen the case for the prosecution.

Thus this passage in the judgment [63] supports what was said above, in relation to provocation, about the kind of burden placed on the accused.[64]

Accident

Little more need be said about this defence than that it was involved in the *Woolmington* case itself, where the effect of a plea of accident on the question of onus of proof was raised. It is clear that accident (which is a complete defence) as well as negligence (which might only result in the reduction of the crime from murder to manslaughter [65]), are dealt with in the same way as provocation and self-defence. The evidential, and not the persuasive burden passes to the accused, who need only raise a doubt as to his "malicious" state of mind, without affirmatively disproving the prosecution's allegation of guilt.

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[61] *i.e.*, the *evidential* but not the *persuasive* burden is on the defence.

[62] Presumably " reasonable " doubt.

[63] [1957] 1 Q.B. at p. 551.

[64] Though at one point Lord Goddard said that there might not have been a misdirection if the trial judge had said that it was not for the accused to establish his plea with the same degree of certainty as was required of the prosecution. This might suggest that the *persuasive* burden has passed (with a different standard of proof). But it is suggested that what was meant was that all the accused had to do was to raise a doubt by the introduction of evidence.

Prosecuting Officer

By Christopher Williams

Past Imperfect

(*Concluded*)

Resumé

"Now, then, Newman, come in and sit down," said Superintendent Portly, as the match flickered up and down over the blackened bowl of his pipe. "Suppose you first of all run over what we said last time—just to see if you've got the basic idea."

"Right, sir," said Newman, cheerfully confident. "To start at the very beginning, there is the basic rule about evidence—evidence may be given only about facts in issue—really that means just the facts constituting the offence—and about facts relevant to the facts in issue—and that means facts explaining the facts in issue. Evidence about anything else is inadmissible.

"Now, evidence about facts actually in issue is *always* admissible; there are no exceptions to that. But evidence about facts *relevant* to facts in issue is *not* always admissible; sometimes there is a rule which excludes it. Character, previous convictions and so on provide some of these exceptions. In other words, character, though always relevant, is sometimes nevertheless inadmissible.

"Now to get down to character. A man's character, past actions or previous convictions are relevant, because it is a matter of ordinary human experience that a man's disposition influences his actions. Applying this to witnesses first, we get that their character and so on is always relevant, because, of course, they are relying on their veracity, integrity and the like to gain belief for what they are telling the court. And so their character is always admissible, excepting when the accused is giving evidence. Applying it now to the accused man, his character too is always relevant, but it is generally inadmissible, because the law says so. But when the accused man's character is, so to speak, promoted from being merely relevant to being actually in issue, it becomes admissible."

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[65] See *R.* v. *Roberts* (1942) 28 Cr.App.R. 102.

Witnesses

"Right," said Portly. "That's not a bad summary. Now let's see how all this is applied in detail. Let's make a start with witnesses. As you said, the degree of credit deserved by a witness must depend on his integrity and veracity. So a witness can always be cross-examined as to his credit, as the lawyers put it. In other words, he can always be asked questions about his past conduct. And what's more, he must answer such questions, unless they render him liable to a criminal charge.[1] The questions can be about anything which reflects on his credibility, including bad conduct [2] and previous convictions.[3]

"If the questions are about bad conduct, then the answers must be accepted by the cross-examiner. But if they are about previous convictions, and the witness denies them, then the cross-examiner can call rebutting evidence to prove the convictions.[3] Of course, I don't suppose you're likely to go and impeach defence witnesses; indeed, I'd want to know all about it if I heard you'd been doing so. But all the same it's your job to know about the point. And you've got to remember that it applies equally to either side, so that one of your own witnesses is liable to be shot at by the defence if he's got previous convictions. You don't want to be taken by surprise. In fact, it might be just as well for you to bring out anything like that in your examination of the witness if it's likely to come up at all, just to get it in the best perspective; it would sound better than having it dragged out by the defence. And as for the accused man's witnesses, it can do no harm for his solicitor, if he has one, to realise you know a little about their murky past; he's more likely to resist the temptation to build up his evidence too much. And that's that, excepting that none of it applies to the accused when he becomes a witness—at any rate, not until he puts his own character in issue in one of the ways we're just going to look at. All right?"

"Yes, sir," replied Newman. "Just one thing, though. If ever it did become necessary to prove a witness's previous convictions, how does one set about it?"

"Well," replied Portly, "you ask him whether he was convicted at such and such a place on such and such a date for such and such an offence, and if he denies it, you ask the court for leave to bring evidence to the contrary. You have to do that, because your case is finished by the time he goes into the box, and you have to get leave to re-open it. Then you can prove it in any of several ways—certified extract from the court register,[4] finger-prints,[5] or whatever's most convenient. But you'll find he won't usually deny his previous convictions, and so you 'prove' them in the end by him admitting them in the box."

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[1] *Cundell* v. *Pratt* (1827) M. & M. 108.
[2] Taylor, *Evidence*, 12th ed., s. 1453.
[3] Criminal Procedure Act, 1865, s. 6.

The accused

"Now let's move to the accused man," went on Portly. "As I said, *his* character, though relevant, is not as a rule admissible. But it *does* become admissible if it is put in issue. And there are two main ways in which that can happen. First, by law, that's to say, when some statutory provision says it is in issue; and secondly, by conduct, that's to say, when some act of the accused man himself puts it in issue.

"Let's take the first of these two ways—the law. This is fairly simple. There are several statutes in which the section defining the offence contains some reference to a previous conviction—sometimes it is to increase the penalty, sometimes it makes an aggravated offence, sometimes it merely gives a power of arrest. But whatever it may be, the previous conviction becomes an integral part of the offence with which the accused is charged, and so it is in issue straight away, and you can—indeed, must—give evidence of it without ado. Our old friend the reputed thief is the best example of this, under section 4 of the Vagrancy Act of 1824. But there are others—section 22 of the Malicious Damage Act of 1861, for instance, or the various aggravated uttering offences under the Coinage Offences Act of 1936. Or there's the useful power of arrest under section 7 of the Prevention of Crimes Act, 1871, and of course there's always section 21 of the Criminal Justice Act of 1948. They make an interesting series—a kind of statutory crime prevention, if you like. But naturally, if any of them applies in any case, it'll all be lined up beforehand."

"Where would section 43 of the Larceny Act of 1916 fit into that lot, sir?" asked Inspector Newman.

"I was just about to come to that one, Newman," replied Portly severely. "Don't be in such a hurry. Section 43 is the most interesting of the lot, in a way, because it is purely a matter of evidence. I mean, it doesn't give a power of arrest, or increase the penalty or anything. It simply says that you are allowed to give evidence of possession of other stolen property within the past twelve months, or of previous convictions for fraud or dishonesty within the past five years, in a charge of receiving—things you simply couldn't do if this section didn't specifically allow you."

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[4] Magistrates' Courts Rules, 1952, r. 56.

[5] Criminal Justice Act, 1848, s. 39.

" But surely, sir," queried Newman, " isn't it a bit like ' similar acts ' you mentioned earlier? "

" Never mind about that now, Newman," replied Portly. " You regard it as a statutory case in which past conduct or previous convictions can be proved as of right, and leave it at that.

" Now let's move on to the second way in which the accused man's character comes into issue—*conduct*. As always, his character starts off by being relevant, but inadmissible because of the rule about prejudice. But the accused can, by conducting himself in certain ways, lose the protection of that rule, so that his character is in issue, and therefore admissible. The position is summed up in section 1 of the Criminal Evidence Act of 1898. That section, among other things that we needn't bother about just now, says that an accused man who goes into the witness box and gives evidence, musn't be asked, and, if asked needn't answer, questions tending to show that he either has been previously convicted or is of bad character, unless certain conditions are fulfilled. We are only concerned with two of these conditions here. The first is to do with his past conduct; the second with conduct during the trial. Let's take them separately.

" First, then, the accused man's past conduct. This condition tells us that the accused man can be asked questions about his past conduct or previous convictions if proof of such matters is admissible to show that he is guilty of the offence now charged. You notice that it says ' is admissible.' This means admissible under the old common law rule about ' similar acts '—we touched on that last time. This rule allows you, in certain circumstances, to give evidence of previous acts by the accused if, from their general similarity to the offence charged, they tend to show that he is guilty of that offence, by establishing guilty knowledge, system, criminal intent, identity and so on, or by rebutting such defences as innocent mistake. That's the common law rule; section 1 of the Criminal Evidence Act goes a stage further and says you can ask the accused man questions about past conduct of this kind.

" There's any amount of cases on this rule, and it's not always easy to follow some of them. But the essence seems to be that past conduct may be held admissible if it tends to establish any of the elements of the crime charged, or to destroy certain defences.

" As to establishing elements of the crime charged, it stands to reason, I suppose, that if you can put before the court instances in which the accused man has previously told the same fraudulent story, or in which he has displayed the same systematic course of action as in the offence now charged, he will less easily persuade the court that he didn't know what he was doing, or had made a genuine mistake, or meant to produce the goods in due course, or whatever his line of defence may be. From that it's equally obvious that there must be a reasonably close connection between the previous ' similar acts ' or conviction and the present charge, not only as to similarity of detail but also as to time. For instance, a previous conviction should be for a similar offence—in one case they wouldn't admit a previous conviction for burglary against a man charged with loitering with intent to commit a felony.[6] And as to the time between the previous conviction and the present offence, although, as you might expect, a man charged with uttering counterfeit coin may have previous possession of counterfeit coin proved against him, in one case a gap of eight years between the previous possession and the present offence was held to be too long." [7]

" I can follow that, sir," said Newman. " But the one I find hard to follow is identity. There seems to be a good deal of logic-chopping about the identity cases."

" I quite agree," replied Portly. " Perhaps the best case to follow on identity is the *Straffen* case.[8] Basically, the idea seems to be that if the details of the earlier crime are sufficiently similar to those of the crime now charged, then each must have been committed by the same person. In other words, the precise methods adopted by a criminal are characteristic of that criminal, in much the same way as his fingerprints are. Now Straffen was sent to Broadmoor, after having been found unfit to plead to a charge of murdering two little girls. He escaped from Broadmoor, and during his liberty a little girl was found murdered nearby. The details of her death tallied very closely with those of the killing of the two earlier victims. Straffen was charged with her murder. His defence was that the murder had been committed by someone else. In other words, he raised the issue of identity; there was no identity, he said, between him and the murderer of the little girl. But the prosecution sought to put evidence before the court showing that Straffen had admitted killing the two earlier victims, and that the present victim was killed in just the same manner. This evidence was accepted on the grounds that the details of the earlier crime were so like those of the later one that they proved that the killer was identical in each case.

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[6] *R.* v. *Tidmarsh* (1931) 23 Cr.App.R. 79.
[7] *R.* v. *Tomasso* (1934) 25 Cr.App.R. 14.
[8] *R.* v. *Straffen* [1952] 2 All E.R. 657.

" But there are some cases that are much harder to follow than *Straffen*. Some of them even seem almost to suggest that previous acts are admissible to prove disposition rather than identity. Take *R.* v. *Thompson*,[9] for instance. A man was charged with gross indecency. His defence was mistaken identity—it was not he, but another man, who had committed the acts. On him, the police found two powder puffs, and in his rooms they found some indecent photographs of boys. The evidence was admitted to show that he was identical with the man who had committed the acts. Yet in another case,[10] where the accused was charged with buggery with one man, the court wouldn't allow evidence to be given of an indecent suggestion made some months earlier to another man."

" Very confusing, sir," said Newman. " Best left alone, I should have thought. Or at any rate, best left to the lawyers."

" Quite," replied Portly. " But now let's have a look at ' similar acts ' used to rebut a defence. The main point here is that it must be a defence reasonably open to the accused. But at the same time, you needn't wait for the defence to be actually put up before you demolish it. You are allowed to anticipate it. The two main cases are *Makin* [11] and *Harris*.[12] Between them they cover a lot of ground, and you ought to read them some time. But, as I said, it must be a reasonable defence—you can't think up fancy defences just so that you can rebut them with damaging evidence of past conduct.[9]

" So there you have past conduct, used to establish elements of the offence now charged, or to rebut a defence. The common law rule says you can give evidence of it—and that means during the case for the prosecution. The statute says you can ask the accused questions about it if he goes into the witness box—and if he denies it, you can call further evidence by leave.

" Now let's turn to conduct during the trial. You will remember that this is the other way in which the accused man's character comes into issue. The accused may be asked questions about his past, if he or his advocate has asked questions of the prosecution witnesses with a view to establishing his own good character, or if he has given evidence of his own good character, or if his defence is such as to involve imputations on the character of the prosecutor or the prosecution witnesses. That's why I label it ' conduct during trial ' as opposed to ' past conduct.'

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[9] *R.* v. *Thompson* (1918) 13 Cr.App.R. 61.
[10] *R.* v. *Hughes* (1949) 33 Cr.App.R. 59.
[11] *Makin* v. *Att.-Gen. for New South Wales* [1894] A.C. 57.
[12] *Harris* v. *D. P. P.* [1952] 1 All E.R. 1044.

" So you've got three bits to this way of letting character in. First—asking questions of the prosecution to establish his good character. Second—giving evidence of his good character. Third —making imputations on the character of the prosecutor or his witnesses.

" First, then, asking questions to establish good character. As with the other bits of this condition—indeed, the same applies to the whole subject—character is indivisible. The accused cannot split his character into separate compartments, some of which he can expose to the public gaze, and some of which he keeps hidden. If he puts any part or aspect of his character in issue, he puts it all in. The big case on this is *Stirland* v. *D. P. P.*[13] You should browse through it; all the important cases are reviewed in it. The sort of thing you might get would be a chap charged with taking and driving away his employer's van without permission. After you've put the employer in the box and examined him, the accused, or his advocate, might ask him if he has always been a good time-keeper, or a hard worker or something of the kind. If he did that, he'd have put his whole character in issue, and if he went in the box you could ask him about his previous convictions. What's more, the previous convictions need not in this case be for similar offences, as they would have to be in the ' similar acts ' rule. But of course you'd have to be reasonable about it—you wouldn't do yourself any good with the court by dragging out a ten-year old conviction for a halt sign offence against a chap charged with forgery.

" What's more, you'd have to be quite sure he had really tried to bring out his good character. An unsolicited effort by your witness to do the best for the poor blighter wouldn't justify bringing out his previous convictions.[14] I mean, you sometimes get a witness who does his duty by giving evidence against the accused, and then has a twinge of conscience and bends over backwards to say something good about him. You couldn't use that.

" Secondly, giving evidence of good character. You won't often find that, you know; the crafty ones will prefer to blow their own trumpet from the dock, where you can't question them. But occasionally you might meet with a character who puts up a tale of good intentions and tries to persuade the court that he just wasn't the sort of man to descend to the depths alleged, because he's actually 'helped the police' on several occasions. Well, I wouldn't have a lot of sympathy for that sort of chap, you know; I hold no brief for the man who thinks he can earn a licence for crime merely by shopping a pal from time to time. If he brings up the subject of his dealings with the police, then I reckon the court's entitled to know *all* about them, including convictions.

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[13] *Stirland* v. *D. P. P.* [1944] A.C. 315.

[14] *R.* v. *Redd* [1923] 1 K.B. 104.

"Thirdly, there's this business of imputations. There are lots of cases on this, and in the last one [15] Mr. Justice Devlin said that some of them were 'hard to reconcile.' And he was right. For instance, in one of the earlier cases,[16] it was said that the words of the section must receive their 'ordinary and natural interpretation' and must not be qualified by adding such words as 'unnecessarily' or 'unjustifiably.' Yet in this latest case,[15] it was said that the words must be given a restricted meaning, or else the accused man's character would emerge as a matter of course. Indeed, Devlin said that it was clear from the wording of the section that the introduction of the prisoner's previous convictions should be exceptional. So you pay your money and choose your colour. It's up to the court to decide how far the accused can go. For instance, as Lord Hewart once said, for the accused to call a policeman a liar would be merely to plead not guilty with emphasis. But for him to say that an alleged confession was obtained by bribery,[17] or was fabricated by the police,[18] or was obtained by threats,[15] have all been held to justify cross-examination as to previous convictions."

"Isn't there something special about rape in this business, sir?" asked Newman.

"Yes," replied Portly. "In a charge of rape, the accused is allowed to go further than in other charges. He can safely ask questions of the prosecutrix about previous intercourse with him, because they are supposed to tend to show consent—a vital element in the charge. But he mayn't ask questions tending to show general immoral character or intercourse with other men, unless he wants his previous convictions brought out, because they amount to imputations within the section. The point seems to be that if the imputations are a consequence of a line of defence naturally open to the accused, it is unlikely that he will be deprived of that defence. But if the imputations are directed merely to destroying the credit of the prosecutor or his witnesses, then the accused must take the consequences. Some people affect to think this a bit hard. For instance, in one book I read,[19] it was pointed out that an accused person with a record never dared allege that a confession had been improperly extorted from him, the implication being, one gathered, that some wicked police officers might think it safe to concoct a 'confession' if they knew the accused had a record. Well, *really*; what wonderful nonsense it is! Anyway, read the reports. And I don't mean just the bits in *Stone* or *Archbold*, either. I mean the reports themselves. And start with this last one, *R.* v. *Cook* [15]; that'll give you all the others. When you've done that, then you can think over the need ever to use your powers."

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[15] *R.* v. *Cook* [1959] Crim.L.R. 358.
[16] *R.* v. *Hudson* (4) [1912] 2 K.B. 464.
[17] *R.* v. *Wright* (1910) 5 Cr.App.R. 137.
[18] *R.* v. *Clark* [1955] 2 Q.B. 469.

"All right, sir, I will," said Newman. "But how is it done?"

"Quite simple, Newman," replied Portly. "If the accused man's character is in issue by reason of his 'past conduct,' then you will no doubt have thought it all out carefully beforehand, getting the advice of the expert if necessary, before coming to the conclusion that it's a reasonable part of your case for the prosecution. This will probably mean, of course, that it's a case for legal aid anyway, and you won't be more than an onlooker. The necessary evidence will then be brought out in the prosecution's case, in the ordinary way. If it's in issue by reason of 'conduct during trial,' you will still have thought it out beforehand and supplied yourself, or the prosecution solicitor, with the necessary facts, and if the circumstances justify it the questions are put to the accused if he goes into the box. If he denies them, then you could ask leave to bring further evidence to rebut the denial—if, I repeat, it is both necessary and desirable."

"I see, sir," said Newman. "But it's just occurred to me that it might well happen that the accused man's solicitor might know nothing of his client's past convictions, and in all innocence ask questions of the prosecution witnesses about his client's good character; bit unfair on the accused, having his past let in like that, don't you think?"

"I don't see that, Newman," replied Portly. "After all, if he can't play straight with his own solicitor, he's asking for trouble. Still, it's a point. Indeed, the judges have said that the proper and fair thing is to let the solicitor know about the previous convictions before the hearing gets going.[20] That should put him on the right lines, and prevent any suggestion of the defence being trapped. And anyway, it does no harm to let him know you know the ropes."

"Right, Newman," said the Superintendent, glancing up at the clock. " That seems to be about the lot. Got it a bit straighter in your mind? "

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[19] Glanville Williams, *The Proof of Guilt*, p. 163.

[20] 39 Cr.App.R. 20.

" Yes, thank you, sir," replied Newman. " If I've followed you, it's like this. Character (in which is included general character, past actions and previous convictions) is always relevant. It is therefore admissible, except for the accused man's, which is protected. Therefore a witness's character can always be brought out, by questions, and by positive evidence in the case of previous convictions. As I have said, the accused man's character is normally protected, but he can lose this protection (a) by law, that is, when a previous conviction is an integral part of the offence charged, and you therefore give evidence of it without fuss ; and (b) by conduct. Conduct can be previous conduct, or conduct during trial. Previous conduct covers ' similar acts '—showing system, intent, identity and so on, or destroying defences such as innocent mistake. You don't have to wait for the defence to be put up, but can anticipate any reasonable defence and give the necessary evidence of ' similar acts ' without ado ; but you can't think up fancy defences just to get the previous convictions in. Conduct during trial means eliciting or giving evidence of good character, or making imputations on the character of the prosecutor. Is that about it, sir? "

" Not bad for a brief summary, Newman," replied Portly.

Newman hesitated. " All the same, sir," he said, " it seems to me that it doesn't give one much scope. I mean, it doesn't seem likely that *I'd* ever get much chance of using any of it. Surely mostly it would arise at Quarter Sessions or Assizes, where we'd be legally represented."

" Look, Newman," replied Portly, leaning forward on the desk. " You're an Inspector, aren't you? Then it's your business to know what's going on around you. You're the one that's got to have the necessary facts and possibilities at your fingertips. To do that, you've simply *got* to know your job. You can't just sit back and leave it to someone else to think of these things. And anyway, you never know when you *might* have to do something yourself. Have you forgotten how all this started? "

Practical application

The Inspector looked blank for a moment. Then he sat up straight. " Of course, sir," he said. " I'd nearly forgotten. This all started with young James, who got away with the offensive weapon charge. He'd got a previous conviction six months before, and I was wondering whether I could, or should, have brought that out. Now then, sir, how would all this have applied there? "

"You ought to be telling me that, you know," replied Portly.

"All right, sir," said Newman. "I'll have a shot. First of all, whether I *could* have brought it out. It looks like 'similar acts,' or previous conduct to me. He neither tried to elicit nor to give evidence of good character, nor did he make any imputations on the prosecution. So there would have to be a connection, both in time and nature. It was only six months before, so that should be all right. And as to nature, it's true it wasn't a bit of chain before, but a bit of lead piping; but the story was near enough the same—picked it up at work, and was going to drop it in next time he was at the yard where he worked; and in each case he'd taken it out of his working clothes and put it in his best suit, on a Saturday, too. In each case the thing had practically no value, except as a weapon. Yes, I think the connection was good enough to show that he didn't have the innocent intention he claimed, but was following a systematic course of action. I would say it would be admitted."

"Fair enough, Newman," said Portly. "Now, leaving aside for the moment the question whether you *should* have brought it out, supposing you had wanted to, how would you have done it?"

"Well, sir," replied Newman. "James told his story while he was in the box, and so I could have asked him a question about it. If he'd denied it, then I could have asked for leave to prove it. . . ."

"If you'd thought it worth while to line it up beforehand, which you probably wouldn't," broke in the Superintendent. "Anyway, he'd never have denied it, once you'd put it to him. But what would you have done if he hadn't chosen to go in the box?"

"In that case, sir," replied Newman, "he'd either have not said anything about it at all, in which case it wouldn't have arisen, or he'd have told his tale from the dock, in which case I doubt if it would have carried enough weight with the court to have benefited him at all, and so again, the point wouldn't have arisen."

"In other words, Newman," said Portly, "you wouldn't have thought it worth while to anticipate such a defence, and so decide to give evidence of it in the course of your case?"

"Definitely not, sir," replied Newman. "I mean, if ever there was a fancy defence, that was one; and as to establishing elements of the offence I wouldn't have thought they needed any establishing, beyond the simple evidence we had. No, the whole point only arose when he told this tale from the box."

"Very well, Newman," said Portly. "So much for whether you could have brought it out, and how you would have done, if at all.

Now let's see whether you *should* have done so—whether you would have been justified in doing so."

Inspector Newman thought carefully for a few moments. "Well, sir," he said, after a pause. "I think I'd have been perfectly justified in bringing it out. After all, we know his explanation just wasn't true; he had the chain as a weapon—I don't say he actually intended to use it, but it made him feel big and tough, a kind of Walter Mitty feeling, and he certainly would have used it if it suited him—like he tried to use the lead pipe the time before. He'd not learned his lesson from that time, and the court was entitled to know just what course of conduct he was really following, so that they might have a chance of saving him from more serious trouble in the end. Yes, I think I would have been justified in bringing out his absolute discharge at Dalesford six months earlier."

"D'you know, Newman," replied Portly, "I believe you're right. But there's just one more thing. Would you feel quite happy about offering the court an absolute discharge as a previous conviction?"

Newman looked astonished for a brief moment. "I hadn't thought of that, sir," he said. "But I can't see why not. I know an absolute discharge is deemed not to be a conviction for any purpose other than the purpose of the proceeding in which the order is made.[21] But after all it wouldn't be the conviction that would be relevant, but the actions that led up to it. I mean, the court in Dalesford found that he'd been carrying a bit of lead pipe as an offensive weapon, without lawful authority. That's what would matter—'similar acts,' in fact. At least, that's how it seems to me."

Superintendent Portly nodded. "Yes, Newman," he said, "You seem to have got the idea."

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[21] Criminal Justice Act, 1948, s. 12 (1).

Practice and Procedure

Committal to quarter sessions for sentence—limiting effect of section 28 *of the Magistrates' Courts Act*, 1952

R. v. Dangerfield

Court of Criminal Appeal: Lord Parker C.J., Cassels and Winn JJ.: May 26, 1959.[1]

D. was convicted at a magistrates' court of taking and driving away a motor-cycle without authority or insurance. He was committed to quarter sessions for sentence under section 28 of the Magistrates' Courts Act, 1952, and was there sentenced on five charges to borstal training and to five years' disqualification from driving, the sentences to be concurrent. On appeal to the Court of Criminal Appeal D. contended that under section 28 of the Act quarter sessions either had power to sentence D. to borstal training or to deal with him in any way in which he might have been dealt with by the magistrates' court, but not both. Accordingly, quarter sessions could not at one and the same time sentence an offender to borstal and to disqualification.

Held, that it was perfectly clear from the section that the powers of quarter sessions were limited to sentencing the offender to borstal training or—in the alternative—dealing with him in any manner in which the court of summary jurisdiction might have dealt with him. However, in the present case there were five charges so that it was within the power of sessions (and, therefore, within the power of this court) to impose borstal training concurrently on four charges and disqualification on the fifth. Accordingly, the sentences would be varied so as to impose borstal training concurrently on four charges and disqualification on the fifth.

Per curiam: Magistrates should remember that in the case of a young man over seventeen years of age it was simpler to commit under section 29 rather than section 28 of the Magistrates' Courts Act, 1952. Then quarter sessions would not be limited in the way which they were when the committal was under section 28. [H. P.]

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[1] For the appellant: *M. D. L. Worsley* (instructed by the Registrar, Court of Criminal Appeal). The Crown was not represented.

Case and Comment [*]

ANIMALS

Dogs—ferocious—" at large "—meaning of

Ross v. Evans

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Salmon JJ.: [1959] 2 W.L.R. 699.[1]

R. was charged with two offences under section 54 (2) of the Metropolitan Police Act, 1839, by suffering an unmuzzled ferocious dog to be at large in a public thoroughfare on two occasions. The justices found that on the occasions in question, R. was exercising a number of greyhounds in a public street. The dogs were on leads, but on each occasion one of them jumped up and bit a passer-by. The leads were each joined to a master lead which was held by R. The justices held that the dogs were " at large " within the meaning of section 54 (2), and, accordingly, found both offences proved. On appeal,

Held, that since R. had some physical control over the dogs, they could not be said to have been " at large " within the meaning of the section.

Semble: There may be a case where a dog is on a lead which is so long that the dog is, to all intents and purposes, " at large."

[D. C.]

Commentary. It seems that the test to be applied is whether the accused person has the physical means of exercising control over the dog. If he has such means then he commits no offence even though he entirely fails to exercise them. The point was a novel one.

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[*] Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For R.: *Stephen Stewart* (instructed by Darracotts). For the prosecutor: *H. Pownall* (instructed by the Solicitor, Metropolitan Police).

COURT OF CRIMINAL APPEAL

Jurisdiction—appeal against sentence—imprisonment in default of payment of estreated recognisance

R. v. Harman

Court of Criminal Appeal: Lord Parker C.J., Donovan and Salmon JJ.: May 11, 1959.[2]

H. pleaded guilty at quarter sessions to office-breaking and larceny and was sentenced to three years' imprisonment. At the time of his trial he was on bail and failed to surrender. The chairman of quarter sessions imposed a further sentence of six months' imprisonment in default of payment of the estreated recognisances. H. appealed to the Court of Criminal Appeal against the sentence of six months' imprisonment.

Held, that the court had no jurisdiction to entertain the appeal. The jurisdiction of the court was limited by the Criminal Appeal Act, 1907, which provided: "A person convicted on indictment may appeal to the Court of Criminal Appeal with the leave of the Court of Criminal Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law" (section 3). And by section 21 of the Act: "The expression 'sentence' includes any order of the court made on conviction with reference to the person convicted." It seemed perfectly clear to this court that "any order of the court made on conviction" must mean "made as a consequence of conviction." Here the sentence of six months' imprisonment, although imposed at the time of the conviction, had nothing to do with the conviction. [H. P.]

Commentary. In *R.* v. *London Sessions, ex p. Beaumont* [1951] 1 K.B. 557 it was held that an "order made on conviction" for the purposes of section 36 (2) of the Criminal Justice Act, 1948, means an order made as a consequence of a conviction. The test applied in that case seems to have been whether the order could have been made if there had been no conviction. As it could, it followed that it was not an order made on conviction. *Cf. Banks* v. *Plane* [1958] Crim.C. & C. 7 The wording of section 3 of the Criminal Appeal Act is similar and it is natural enough that it should be similarly interpreted.

In the case of binding over orders with which the *London Sessions* case was concerned, provision for an appeal has since been made by statute: Magistrates' Courts (Appeals from Binding Over Orders) Act, 1956. Is it not desirable that there should be a right of appeal in all cases in which sentence of imprisonment may be imposed? *Cf. Re Hastings* (*No. 3*), below, p. 584.

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[2] For the appellant: *P. Bruce* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Harold Cassel* (instructed by the Solicitor, Metropolitan Police).

HABEAS CORPUS

Court of Appeal—no jurisdiction in "criminal cause or matter"

Re Hastings (No. 3)

Court of Appeal: Lord Evershed M.R., Romer and Pearce L.JJ.: *The Times,* June 15, 1959.[3]

The applicant, who had twice applied to a Queen's Bench Divisional Court for a writ of habeas corpus, which had on both occasions been refused ([1958] Crim.L.R. 332, 687; [1959] Crim. L.R. 125), subsequently applied to a Divisional Court of the Chancery Division. His application was refused ([1959] Crim.L.R. 361). On appeal to the Court of Appeal,

Held, dismissing the appeal, that, since the appeal was "in a criminal cause or matter," the court had no jurisdiction to hear the appeal. [D. C.]

Commentary. The Court of Appeal had in fact already decided this point in its judgment of July, 1958 ([1958] Crim.C. & C. 59). In non-criminal matters, a person who alleges that he is illegally detained may appeal to the Court of Appeal and the House of Lords from the ruling of a judge or divisional court. It is submitted that it is entirely illogical that there should be no similar right of appeal where the detention arises from criminal proceedings.

The Report by "Justice" on *Contempt of Court* has proposed that section 31 (1) (*a*) of the Judicature Act, 1925, which excludes appeals "in any criminal cause or matter" should be amended by the insertion of the words "(other than contempt of court)." It is submitted that, if the section is to be amended, there are other cases, such as the present, where the desirability of a right of appeal should be considered. And *cf. R.* v. *Harman*, above, p. 583.

[See hereon p. 546, above: Ed.]

HOMICIDE

Murder—manslaughter—provocation—burden of proof

R. v. Fantle

Central Criminal Court: Salmon J.: September 25, 1958.[4]

Fantle was charged with the capital murder, by shooting, of one Lindsay. Fantle had an exemplary record and had been happily married until his wife met and became infatuated by Lindsay. He, on July 9, bought a revolver and on the morning after his wedding anniversary, having loaded the revolver, called on Lindsay, who treated him with contempt and intimated that Fantle's wife had spent the night with him. Fantle then shot and killed Lindsay and later gave himself up and made a statement to the police.

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[3] The applicant appeared in person. For the Crown and the Governor of H.M. Prison, Durham: *Sir Harry Hylton-Foster, Q.C., S.-G.,* and *J. R. Cumming-Bruce* (instructed by the Treasury Solicitor).

[4] For the prosecution: *T. Christmas Humphreys* and *J. Mervyn Griffith-Jones* (instructed by D. P. P.). For the defence: *Victor Durand, Q.C., Jeremy Hutchinson* and *Edward Morrison* (instructed by Messrs. Head & Walter, Broad Court Chambers, W.C.1).

After stating the facts, Salmon J., in his summing-up, said: "Now, members of the jury, murder means this: if any person unlawfully kills another intending to kill him or to do him grievous bodily harm that is murder. It is subject to this . . . that the defence of provocation is always open. If the prosecution fail to negative provocation the jury must bring in, if they think there was an intention of killing, a verdict of 'Not guilty of murder but guilty of manslaughter.' Provocation is anything done or said by the dead man to the accused which would cause in any reasonable person, and actually caused in the accused, a sudden and temporary loss of self-control so that for the moment he was not master of his own mind. . . . I want to remind you of something with which I am sure you are quite familiar, but the importance of it cannot be exaggerated: it is not for that man to prove his innocence. He is deemed to be innocent until he is proved to be guilty beyond any reasonable doubt. . . . You will observe that phrase 'reasonable doubt.' It does not mean some light, airy, insubstantial doubt that may flit through the minds of any of us about almost anything at some time or other, it does not mean a doubt begotten by sympathy out of reluctance to convict; it means a real doubt, a doubt founded on reason. If you had any such doubt about this man's guilt he is entitled to be acquitted of murder, but if, having listened to the whole of the evidence, your minds were driven to a clear conclusion that he was guilty, why, it would be your stern duty to steel yourselves and say so. . . . It is conceded, as it has to be conceded on behalf of the defence on these facts, that there are only two possible verdicts, either guilty of murder or not guilty of murder but guilty of manslaughter, and the defence, of course, are asking you to bring in a verdict of manslaughter on the basis of provocation. Although that is a defence raised on behalf of Fantle, it is important that you should thoroughly understand that it is not for him to establish provocation. . . . in considering whether there was provocation in this case, you are entitled, and indeed it is your duty, to take into account everything done and said by the dead man according to the effect which, in your opinion, it would have on a reasonable man. However badly Lindsay behaved in seducing

Mrs. Fantle, you will have to consider whether this man was provoked in the sense that I have indicated. Well, I do not suppose you will have any doubt about [it] that he was provoked to lose his self-control. Indeed, the Crown do not seriously challenge that. But that is not enough in itself to return a verdict of manslaughter, because you have got to consider whether what Lindsay said and did would have had the effect on the ordinary reasonable man to provoke him so that he would lose his self-control and shoot Lindsay. . . . He was received by this gentleman, Mr. Lindsay, sitting down, smug and patronising, he was insulted and taunted, he had been through hell for months, and after Lindsay had suggested that Mrs. Fantle had spent that night in his, Lindsay's, bed, and on the very anniversary of their wedding day, out came the gun and he shot him three times. . . . You know it is an important case also from a public point of view because there are a lot of co-respondents in the Divorce Court who behaved very badly and, no doubt, deserved punishment, but it would not do if people went about shooting. The circumstances here, you may think, are quite exceptional, quite exceptional from the ordinary case you hear too [often] in the Divorce Court. . . . If, having heard the whole of the evidence, you are satisfied that however badly Lindsay may have behaved, whatever contempt you may have for him and sympathy you may have for this man, that nevertheless what was said and done fell short of provocation in law, and if you are convinced that this man always had ever since July 9 the intention of killing Lindsay, then it would be, as I have said, your duty to find him guilty of murder." Verdict: Guilty of manslaughter: not guilty of murder. Sentence: three years' imprisonment. [C. B. ORR, *Barrister-at-Law.*]

Commentary. The Homicide Act, 1957, retains the dual test of the common law in relation to provocation. The provocation must not only have been such as to deprive the accused person of his self-control, but also such that a reasonable man in his position might have been provoked into similar action. Whereas before the Act, however, it was open to the judge to withdraw the defence from the jury either on the ground that there was no evidence that the accused was provoked or on the ground that there was no evidence on which it could be said that a reasonable man would have been provoked, it is now provided by section 3 of the Act that, where there is evidence (which is, of course, a question for the judge) on which the jury can find that the person charged was provoked, " the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury." It thus appears that the defence could now only be withdrawn on the former and not on the latter ground.

It seems that there was clear evidence in the present case that Fantle was provoked to lose his self-control and the provisions of the Act thus required that the defence be left to the jury. Before the Act the defence might well have been withdrawn from the jury, for in *Holmes* v. *D. P. P.* [1946] A.C. 588, 600, Viscount Simon laid it down that " in no case could words alone, save in circumstances of a most extreme and exceptional character," suffice to reduce murder to manslaughter. Section 3 of the Act, as well as making the change in the law noted above, makes it clear that words alone (" whether by things done or by things said or by both together ") may suffice.

PUBLIC JUSTICE

Conduct with intent to pervert the administration of—fabrication of evidence—evidence—meaning of

R. v. Smalley

Leeds Assizes: Mr. Commissioner G. G. Baker Q.C.: April 20, 21, 1959.[5]

The accused, a police constable, was charged on two counts: first, fabrication of evidence with intent to mislead a judicial tribunal and, secondly, fabrication of evidence with intent to pervert the course of justice. The case for the prosecution was that, while engaged in the investigation of a crime of larceny, the accused had fabricated written statements of evidence by four witnesses whom he had never interviewed and had forged their signatures thereon and had also made a written statement of his own evidence recounting fictitious interviews with two men and their alleged oral statements to him. All these written statements, together with a summary of evidence, were submitted to his superior officers and as a result summonses were applied for and granted against the two men charging them with larceny. On the date fixed for the hearing of the summonses the two men came to the magistrates' court but were sent away by the constable before appearing before the magistrates. Before the adjourned hearing the constable confessed and all his fabricated material was discarded. At the adjourned hearing before the magistrates one of the men pleaded " Guilty " to the offence and the other was convicted on fresh oral evidence including that of the man who had pleaded " Guilty."

On the trial of the accused constable his counsel submitted at the close of the case for the prosecution that the facts disclosed did not constitute either of the offences charged in the indictment. The grounds of the submission were that " evidence " meant evidence in court; the fabricated statements and summary of evidence had no tendency to mislead a judicial tribunal or to pervert the course of justice because those documents could never be put in evidence in court; apart from the determination of the case itself there could be no perversion of justice unless a false charge were brought; formerly, the making of a false charge used to be the subject of a charge of public mischief but now it was only an offence if there was a conspiracy.

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[5] For the Crown: *Geoffrey Baker* (instructed by R. C. Linney, Wakefield). For the accused: *D. Wagstaff* (instructed by Whitfield, Son & Hallam, Dewsbury).

Held, that the proper approach to the facts of the case was that of Pollock B. in *R.* v. *Vreones* ([1891] 1 Q.B. 360 at p. 369): " The real offence here is the doing of some act which has a tendency and is intended to pervert the administration of public justice." The word " evidence " is not to be used in a narrow sense but includes material which may influence, even indirectly, the judicial tribunal. The material fabricated by the accused could mislead a judicial tribunal in deciding that there should be a prosecution as the accused's superior officer would not have made an application for summonses, at least against one of the men, had he known of the fabrication. A warrant for the arrest of the men after their non-appearance to the summonses could have been issued as a result of it. Further, on a plea of " Guilty " the men would be liable to be dealt with on the basis that the fabricated material was true; and on a plea of " Not Guilty " the case for the prosecution might be opened falsely. There was therefore a case for the defence to answer.

The accused was found " Guilty " by the verdict of the jury and was sentenced to twelve months' imprisonment to run concurrently with a sentence on another indictment.

[G. M. SMAILES, *Barrister-at-Law*.]

Commentary. The fabrication of false evidence with intent to mislead a judicial tribunal or to pervert the course of justice is a misdemeanour at common law. In *R.* v. *Vreones* (1891) 1 Q.B. 360, it was clearly held that the offence was complete even though no tribunal had been misled because the piece of evidence in question had not been used. In that case the evidence (bags of corn) was falsified by the accused and forwarded by him to the London Corn Trade Association with the intent that it should be used in a forthcoming arbitration. Lord Coleridge C.J. appears to have regarded the offence as, in substance, an *attempt* to pervert the course of justice. He said, " All that the defendant could do to commit the offence he did " and " . . . the offence of the defendant was completed so far as his act could complete it, when he sent to London the samples which might or might not be used in the arbitration." The only possible distinction between the two cases would seem to be that it might be said that the present accused's acts were merely preparation and had not yet reached the stage of an attempt. It is thought, however, that, by any test, the accused's acts had reached that stage.

Quaere whether the accused could have been convicted if he had never submitted the forged evidence to his superior officers. Is mere fabrication of the evidence, with an intent to pervert the course of justice, enough?

ROAD TRAFFIC

Taking and driving away—passenger in vehicle

Ross v. Rivenall

Queen's Bench Divisional Court: Lord Parker C.J., Donovan and Salmon JJ.: May 1, 1959.[6]

The defendant was charged with unlawfully taking and driving away a motor-car without the consent of the owner, and unlawfully using the vehicle without there being in force a policy of insurance. Between 7.30 p.m. on August 29 and 8.30 a.m. on August 30, 1958, a motor-car, which had been left by its owners locked, without an ignition key and with only sufficient petrol to travel six miles, was taken and driven away without authority. At 1.55 a.m. on August 30, the car was found stranded six miles away with four men in it, one of whom was the defendant who was lolling in the back with his feet outstretched. No ignition key was found but the lights were on and clearly someone had been tampering with the car. When told he was going to be arrested the defendant made no reply but when he got to the police station, according to the police evidence, he said: "A bloke stopped me and asked me if I wanted a lift, so I got in." The magistrates convicted the defendant on both charges but, on appeal, the Recorder took the point that there was no prima facie case made out that the defendant was acting in concert with the driver or other people in the car. The Recorder then ruled that the prosecution had failed to make out a case on either charge and was of opinion that the facts were reasonably consistent with the conclusion that the defendant might well have been an innocent passenger and that the prosecution had failed to prove the contrary. The prosecution appealed.

Held, allowing the appeal, that on the facts of the present case (namely, that four men were found at 1.55 in the morning in a motor-car out of petrol six miles from where it was taken, that the defendant, who said he had been offered a lift, was making no effort to continue his journey and that when arrested he said nothing) a prima facie case of association between the defendant and the driver of the car was made out and therefore the appeal would be allowed and the case remitted to the Recorder.

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[6] For the prosecution: *Paul Wrightson* (instructed by the Solicitor, Metropolitan Police). For the defendant: *R. J. Trott* (instructed by Mitchells).

[Miss C. J. ELLIS, *Barrister-at-Law*.]

Commentary. The position is perhaps analogous to that which arises where a person is found in possession of goods which are proved to have been recently stolen. Just as in that case the mere fact of possession is evidence (a so-called presumption of fact) on which a jury may lawfully convict the possessor either of stealing or of receiving the goods, so in the present case it would seem that there was prima facie evidence of an unlawful taking by the defendant.

In such circumstances the onus of proof remains on the prosecution throughout. Even if he offers no explanation the jury should be told that they may convict only if they are satisfied beyond reasonable doubt of his guilt. Thus the only burden which can be put upon the accused is that of raising a reasonable doubt in the jury's minds. If he tells a story which they think may reasonably be true, even though they are not convinced of its truth, then they should acquit.

The fact that an accused person remains silent when charged with a crime is not evidence against him: *R.* v. *Leckey* [1944] 1 K.B. 80; *R.* v. *Naylor* [1933] 1 K.B. 685; but it is certainly a matter which may be taken into account in deciding what weight should be attached to any defence which he subsequently raises: *R.* v. *Littleboy* (1934) 24 Cr.App.R. 192. *A fortiori* an observation made by an accused person on being arrested may be considered by the jury: *R.* v. *Gerard* [1948] 1 All E.R. 205.

SENTENCE

One act—two offences—sexual psychopath—consecutive sentences in public interest—voluntary castration

R. v. Cowburn

Court of Criminal Appeal: Lord Parker C.J., Donovan and Salmon JJ.: May 11, 1959.[7]

C. pleaded guilty at quarter sessions to assault with intent to ravish and to possessing an offensive weapon. He was sentenced to two years' imprisonment (*i.e.*, the maximum) for each offence, the sentences to run concurrently. The offence took place when C. stopped a hospital nurse on a towpath, threatened her with a knife and made clear his intention to ravish her. At the time of the offence C. had just completed four years' imprisonment for rape. On appeal to the Court of Criminal Appeal, counsel for C. asked the court to give its blessing to the performance of an operation on C. in prison, which might have the effect of curing C. and which C. was prepared to undergo.

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[7] For the appellant: *F. E. Harris* (instructed by Messrs. Calvert, Smith & Sutcliffe).

Held, that C. was apparently a psychopath with uncontrollable sexual impulses. In the ordinary way two consecutive sentences should not be passed for what was in effect one act and one offence, but here an exception ought to be made to that rule. It was essential in the appellant's own interest and for the protection of the public that C. should be given a sentence for each of the offences to run consecutively. The court refused to give its blessing to an operation on C. What took place in prison was not its concern. The appeal would be dismissed and the sentences must stand. [H. P.]

Commentary. The medical reports on C. suggested that there were only two possible solutions to his case: hormone treatment or castration. It appeared that he was prepared to undergo such an operation. The doctors were agreed that the operation should take place in prison and C.'s counsel asked the court to give their blessing to it, in order to assure the prison officers that it would not be unlawful or contrary to public policy and to encourage them to do it. The court declined to do so.

There is some doubt about the legality of such an operation as that proposed even when the patient consents to its being performed. In *Bravery* v. *Bravery* [1954] 1 W.L.R. 1169, 1180, Denning L.J. (as Lord Denning then was) expressed the opinion that a sterilisation operation, performed to enable a man to have the pleasure of sexual intercourse, without shouldering the responsibilities attached to it, is a criminal assault. The operation contemplated in the present case was, of course, of a more drastic nature and, therefore, even more likely, prima facie, to be condemned by Lord Denning. It should be noted, however, that Lord Denning qualified his remarks by saying that, when a sterilisation operation is done with the man's consent for a just cause, it is quite lawful; " as, for instance, when it is done to prevent the transmission of an hereditary disease." It would seem likely, then, that he would regard the circumstances of the present case as affording just cause, even for the more drastic operation here proposed. Moreover, Lord Evershed M.R. and Hodson L.J. expressly dissociated themselves from Lord Denning's remarks, holding that the question of illegality was irrelevant to the issue before the court, which was whether the husband's act amounted to cruelty so as to entitle his wife to a divorce.

Supervision order — failure to register address — meaning of " address "

R. v. Bishop

Court of Criminal Appeal: Lord Parker C.J., Slade and Winn JJ.: June 15, 1959.[8]

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[8] For the appellant: *R. Brock* (instructed by the Town Clerk, Portsmouth). For the Crown: *J. Edwards* (instructed by the Registrar, Court of Criminal Appeal).

B. was convicted at quarter sessions of failing to register his address pursuant to the First Schedule of the Prison Act, 1952, and was sentenced to nine months' imprisonment. Prior to the offence B. was a person subject to the provisions of section 22 of the Criminal Justice Act, 1948, relating to supervision orders. Section 29 of the Prison Act, 1952, provides that where a person subject to a supervision order fails to inform the appointed society of his address the society must give notice of the failure to the Commissioners of Police of the Metropolis and thereafter that the provisions of the First Schedule to that Act apply to the offender. The First Schedule provides, *inter alia*, that a person to whom the Schedule applies must register at an appointed police station in any police area in which he is from time to time residing the address of his residence (certain defences as to temporary absences and journeys, etc., may be raised). Paragraph 4 (1) of the Schedule provides that a person shall be deemed to reside at any house or other place of whatever description at which he spends the night. Paragraph 2 of the Schedule provides that a person who fails without reasonable excuse to comply with the requirements of the Schedule is guilty of an offence and liable on summary conviction to imprisonment for a term not exceeding six months. The facts of the present case were that B., being a person subject to the provisions of the First Schedule, had gone to Portsmouth on February 18, failed to register at the police station and was arrested on February 20. In evidence he said that he had had no fixed abode and had been wandering about Portsmouth all the time. On appeal to the Court of Criminal Appeal:

Held, dismissing the appeal, (1) that the whole object of the Act would be defeated if a man could avoid the obligation to register by sleeping rough and saying, in effect, that he had no address. In the opinion of the court, " address " denoted something less than a postal address and the obligation which arose on " deeming to reside in any place of whatever description at which he spends a night " could be fulfilled and should properly be fulfilled by giving a reasonable identification of such a place. In the present case B. had clearly " spent a night " in a place of some description in Portsmouth.

(2) The First Schedule provided that the maximum sentence on summary conviction was six months' imprisonment. Here B. had elected to go to quarter sessions for trial and it had been argued that, in those circumstances, the punishment at sessions was entirely at large. This court could not accede to that argument. The provision that the prisoner was liable on summary conviction to imprisonment for a term not exceeding six months meant that he

was so liable on conviction in proceedings initiated in a court of summary jurisdiction. Accordingly, the conviction would stand but the sentence would be reduced to one of six months' imprisonment. [H. P.]

TRIAL

Deposition—absence of witness—failure to sign deposition

R. v. Williams

Scarborough Quarter Sessions: Recorder J. Stanley Snowden, Esq.: April 30–May 1, 1959.[9]

W. was charged with being under the influence of drink to such an extent as to be incapable of proper control of his motor-car. He had been examined at a material time by his own doctor, who was of the opinion that he was fit to drive.

The depositions were taken on March 4, and it was then known that W.'s doctor intended to emigrate to Africa within a few days. He gave evidence on oath for the defence, and was cross-examined. The court was then informed by W.'s counsel that W. did not require the attendance of the doctor at the trial in person, and was referred to *R.* v. *Morphew* (1814) 2 M. & S. 602 and Magistrates' Courts Act, 1952, s. 5 (2), and the doctor was accordingly conditionally bound over.

At the trial it was discovered that the magistrate had signed each prosecution deposition but had omitted to sign the doctor's deposition (Magistrates' Court Rules, r. 5).

On an application by the defence to read the doctor's deposition to the jury, the Recorder *held*, though with great reluctance:

(1) The words "any statement of the accused" in Magistrates' Courts Act, 1952, s. 5 (2), covered the statement made to the magistrate by W. through his counsel; thus the doctor was properly conditionally bound over and accordingly his deposition could be read—even though the doctor's evidence covered a most essential matter in the case.

(2) Although the deposition had not been signed on March 4, this could be cured even at that late stage, and the court would adjourn for the magistrate to be fetched.

(When the magistrate arrived, he was in fact able to say that he remembered the case and the doctor giving evidence and accordingly he signed the deposition there and then. W.'s counsel then read the deposition.)

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[9] For the prosecution: *John Mellor* (instructed by Whitfield, Bell & Smith, Scarborough). For the defence: *Gilbert Gray* (instructed by Medley, Drawbridge & Co., Scarborough).

[LIONEL SCOTT, *Barrister-at-Law*.]

Commentary. By section 5 (2) of the Magistrates' Courts Act, 1952, "Where it appears to the court, after taking into account any representation made by the accused or prosecutor, that the attendance at the trial of any witness examined before the court is unnecessary by reason of any statement by the accused, or of the accused having admitted before the court the truth of the charge, or of the evidence of the witness being merely formal, the court shall . . . bind him over to attend the trial conditionally, that is to say, on notice being given to him and not otherwise."

It is difficult to see how the magistrate could have decided in the present case that the evidence of the doctor was unnecessary within the meaning of this section, for it was certainly not merely formal evidence.

The fact that the doctor was now in Africa would not in itself afford a ground for the reading of his deposition in evidence. Under the Criminal Justice Act, 1925, s. 13 (3), the only depositions which may be read at the trial are those of witnesses whose attendance is stated to be unnecessary or who are proved to be insane or so ill as not to be able to travel, or to be kept out of the way by or on behalf of the accused.

Evidence—question of admissibility—presence of jury

R. v. Francis and Murphy

Court of Criminal Appeal: Lord Parker C.J., Byrne and Winn JJ.: June 8, 1959: *The Times*, June 9, 1959.[10]

F. and M. were convicted at quarter sessions of offences relating to stolen car radios. At the trial objection was taken by counsel for the defence as to the admissibility of statements made by the defendants to the police. The objection was made when the police officer was being examined, but the recorder refused to give a ruling at that stage and said that the simpler and better course was for the evidence to be called before the jury before he gave a ruling. The matter was then put before the jury and they were, in effect, invited to say whether they believed that the confessions were voluntary or whether they were obtained under inducements. On appeal to the Court of Criminal Appeal:

Held, allowing the appeals, that it had always been the settled practice for a challenge to be made to the admissibility of evidence at an early stage and in the absence of the jury. The practice was set out in *Archbold* at §§ 1114 and 1115, where it was said that the proper course was for the judge to hear the evidence in the absence of the jury and to rule upon that evidence whether the alleged confession be admitted or not. If the matter were admitted, the weight and value of the confession remained for the jury. The prisoner was entitled both to a ruling from the judge as to admissibility and to the verdict of the jury as to the weight and value of the confession. The course adopted in the present case might result in something coming before the jury which would later be held inadmissible. A further point arose here because when the matter was left to the jury it was left to them in the form: "Do you believe these statements, or do you not?" The jury were not directed that the onus was on the prosecution to satisfy them that the statements were voluntary; and in those circumstances this court did not feel that it would be a proper case in which to apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907. Accordingly the convictions would be quashed. [H. P.]

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[10] For the appellants: *I. S. Hill* (instructed by the Town Clerk, Bristol). For the Crown: *P. W. Esling* (instructed by the Registrar, Court of Criminal Appeal).

Commentary. The rule laid down is the well-established English procedure. In the majority of American states it seems that the practice (known as the *New York* procedure) is similar to that adopted by the recorder in the present case. The two procedures are compared in an article "The Role of Judge and Jury in Determining a Confession's Voluntariness," 48 *Journal of Criminal Law and Criminology* 59 (America), in which the writers conclude: "The orthodox [*i.e.*, English] procedure offers both the court and defendant certain distinct advantages . . . For example, since the jury is required to consider only credibility unhampered by preliminary considerations of admissibility, the judge is permitted to give an uncomplicated instruction. Furthermore, the defendant is offered more protection against the jury's considering his coerced confession because the orthodox rule is not based on the delicate assumption that a jury will be able to disregard evidence that has been placed before them. In addition, the defendant, under the orthodox procedure, is given a definite determination of the admissibility question. Where the jury determines the issue of voluntariness, the defendant and the appellate court have the impossible task of disentangling this determination from the general verdict."

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Imprisonment

In R. *v*. COATES the court (Lord Parker C.J., Cassels and Winn JJ.: May 27, 1959) ordered the immediate discharge of the appellant in the following circumstances: C. had been convicted at quarter sessions of stealing by finding and sentenced to nine months' imprisonment consecutive to a sentence of six months' imprisonment which he was then serving. He was a man of twenty-five years of age and had previously been bound over, fined, sent to Borstal, recalled, sentenced to twelve months' imprisonment and to three years' corrective training in 1955 for ten housebreakings. He was last released from prison in October, 1957. The court stated that the offence which brought him the present sentence was somewhat trivial. He had found an old passport on a rubbish heap and, not knowing what it was, had taken it home as a curiosity. In fact, by this time C. had served about one month of the sentence of nine months and this court had come to the conclusion that that was sufficient punishment for the offence. In those circumstances the court would pass now such a sentence as would enable him to be discharged immediately.

In R. *v*. JUDD the court (Lord Parker C.J., Cassels and Winn JJ.: June 1, 1959) reduced a sentence of three years' imprisonment to one of eighteen months' imprisonment. J. had pleaded guilty at quarter sessions to housebreaking and larceny (breaking into a dwelling-house and stealing rings, watches and other property worth about £33 in all). J. was a man of forty-eight years of age with six previous convictions for offences of dishonesty. His last conviction was in 1951 when he was sentenced to five years' imprisonment for housebreaking. The court stated that after J. had been released from prison in 1954 he had worked well and had kept out of trouble until February, 1959. Further, the present offence was committed when J. was out of work, had been evicted from his home and unable to draw National Assistance because he had no fixed address. It seemed to this court that the sentence of three years' imprisonment did not take into consideration the fact that J. had gone a long way towards running straight since his last conviction nor the particular circumstances under which he had felt constrained to steal. Accordingly the sentence would be reduced to one of eighteen months' imprisonment with an order under section 22 of the Criminal Justice Act, 1948.

In R. *v*. ABRAHAMS the court (Lord Parker C.J., Byrne and Winn JJ.: June 8, 1959) varied a sentence of eight years' preventive detention to one of six years' imprisonment. A. had been convicted at the Central Criminal Court of shopbreaking and larceny. A., who was a man of forty-seven years of age, had eight previous convictions. His last conviction was for shopbreaking and larceny in 1952 when he had been sentenced to four years' imprisonment. He was last released from prison in March, 1955. The present offence concerned the breaking into (with two other men) a sub-post office. Explosives were used, a safe was blown open; £381 in cash and postal orders, stamps, etc., to the value of £1,800 were taken. The court stated that after A.'s release from prison he had been employed as a driver's mate so that, for a period of over three-and-a-half years, he had been in employment and made all attempts to rehabilitate himself. The court felt that this was not a case for preventive detention but rather for imprisonment. Accordingly, a sentence of six years' imprisonment would be substituted for the sentence of preventive detention with an order under section 22 of the Criminal Justice Act, 1948.

In R. *v*. GOULD AND SIMS the court (Lord Parker C.J., Slade and Winn JJ.: June 15, 1959) reduced sentences of seven years' imprisonment to three years' imprisonment in each case. G. and S. were convicted at quarter sessions of the larceny of metal (valued at 50s.). G. was a man of thirty-one years of age with eleven previous convictions. S. was a man of forty-one years of age with six previous convictions. The present offence was the third occasion when they had been convicted together of stealing metal. The court stated that the sentences of seven years' imprisonment were wrong in principle. Seven years for stealing property to the value of 50s. seemed utterly out of proportion and could only be justified on the basis of the offender's past offences. On the other hand, a long period could have been imposed, even though the value of the property was small, by a sentence of preventive detention. But preventive detention not having been ordered the appropriate sentence was one of three years' imprisonment and, accordingly, that sentence with an order under section 22 of the Criminal Justice Act, 1948, would in each case be substituted for the sentence of seven years' imprisonment.

Detention in detention centre

In R. *v.* LOWE the court (Lord Parker C.J., Byrne and Winn JJ.: June 8, 1959) varied a sentence of borstal training to one of detention for three months in a detention centre. L. had pleaded guilty at quarter sessions to receiving, eleven other cases being taken into consideration. L., who was a young man of seventeen years of age, was of previous good character. The court stated that between December 20, 1958, and January 21, 1959, L. had been concerned with another young man in no less than thirteen house and store-breakings and larcenies. The total value of the property stolen was under £50. The court felt there was doubt as to whether borstal training was necessarily the right sentence. There had been no previous indication that this boy was in need of discipline: it was an orgy concentrated into a month. The court had decided to set aside the sentence of borstal training and to substitute three months in a detention centre.

In R. *v.* MCGEADY the court (Lord Parker C.J., Slade and Winn JJ.: June 15, 1959) varied a sentence of borstal training to one of detention in a detention centre. M. had pleaded guilty at assizes to two offences of causing grievous bodily harm with intent. M., who was a young man of sixteen years of age, had one previous conviction for which he had been put on probation. The court stated that it had been said that M. was an excellent worker and that his response to probation had been good. This was a proper case for detention and, accordingly, a sentence of three months' detention in a detention centre would be substituted for the sentence of borstal training.

Acts and Orders*

Animals

The Swine Fever Order of 1938 (S.R. & O., 1938, No. 203) is amended. The principal changes are the omission of the obligation on the part of the police to notify the Head Office of the Ministry of Agriculture, Fisheries and Food when a case of suspected swine fever is reported, and the alteration of the definition of "pig dealer." Operative June 29, 1959. SWINE FEVER (AMENDMENT) ORDER, 1959 (S.I. No. 939) (3d.).

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* Prepared by F. Maurice Drake, *Barrister-at-Law.*

The Regulation of Movement of Swine Order, 1954 (S.I. No. 911) and the Amending Order of 1955 (S.I. No. 1051) are consolidated with further amendments, the principal of which are (1) authorisation of a sale of swine is no longer necessary if (a) the swine are the standing herd of a farm and are sold there; or (b) the sale is held in connection with an exhibition or show. (2) Movements of swine from all sales wherever held must now be licensed except (a) movements from sales specified under (1) above and (6) movements from authorised sales of swine in the same ownership on premises where there were no other swine on the day of the sale, provided that the movement is to a place other than a market, fairground or saleyard and that a declaration by the owner has been made to the effect that no swine have been or will be moved on to his premises during the twenty-eight days preceding the sale. Operative August 2, 1959. REGULATION OF MOVEMENT OF SWINE ORDER, 1959 (S.I. No. 1029) (4d.).

For penalties for contraventions see sections 79 and 82 of the Diseases of Animals Act, 1950.

Food and Drugs

The Public Health (Condensed Milk) Regulations, 1923 (S.R. & O. No. 509), as subsequently amended are substantially re-enacted in revised form. They apply only in England and Wales. Certain new provisions are introduced, the principal of which are (a) to provide for the sale of condensed partly skimmed (half cream) milk labelled " should not be used for babies except under medical advice " (paragraphs 1 (*c*) and (*d*) of the First Schedule); (b) to define half cream milk as meaning milk which contains not less than 10·8 per cent. of milk solids including not less than 1·8 per cent. of milk fat (paragraph 2 of the First Schedule); and (c) to prescribe minimum percentages of milk fat and milk solids including fat for condensed partly skimmed (half cream) milk (Second Schedule). Operative June 26, 1959. CONDENSED MILK REGULATIONS, 1959 (S.I. No. 1098) (4d.).

For penalties for contraventions, see Regulation 7 of these Regulations.

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 973 (Carshalton) (3d.); 974 (Greenwich and Lewisham) (2d.); 975 (Hendon) (2d.); 1079 (St. Marylebone) (3d.); 1080 and 1081 (Deptford) (each 2d.).

The following Order has been made prohibiting cycling on footpaths: S.I. No. 976 (Otford, Kent) (3d.).

The London Traffic (Parking Places) Consolidation Regulations, 1957 (S.I. No. 1937), as amended (by S.I. 1958, No. 1574) are further amended, the principal changes being (1) the appointment of certain parking places in Lambeth, Southall, Watford, Wood Green, Gravesend, Esher and Hornchurch is revoked; (2) the limits of certain parking places in Camberwell, Deptford, Hackney, Holborn, Kensington, Paddington, St. Pancras, Barnes, Ealing, Gravesend, Watford, Loughton, Coulsdon, Esher and Hornchurch are altered; (3) the permitted times during which vehicles may wait at certain parking places in Slough and Watford are extended; (4) the position in which vehicles may wait in a parking place in Northfleet is altered, and the class of vehicles permitted to use that parking place is restricted; (5) new parking places are appointed in streets in Lambeth, Wandsworth, Bexley, Hornsey, Watford, Esher and Hornchurch. Operative June 14, 1959. LONDON TRAFFIC (PARKING PLACES) CONSOLIDATION (AMENDMENT) REGULATIONS, 1959 (S.I. No. 977) (5d.).

Regulations which restrict the sale of goods from vehicles and the waiting, loading and unloading in the streets of vehicles in certain parts of Westminster (S.I. 1958, No. 1094) are now amended so that the restrictions apply in part of Oxford Street. Operative June 24, 1959. WESTMINSTER (WAITING AND LOADING) (RESTRICTION) (AMENDMENT) REGULATIONS, 1959 (S.I. No. 1077) (3d.).

Restrictions are imposed on the sale of goods from vehicles and on vehicles with regard to waiting, loading and unloading in streets in an area in the Metropolitan Borough of St. Marylebone, during the period from 8.30 a.m. to 6.30 p.m. on Mondays to Fridays and 8.30 a.m. to 1.30 p.m. on Saturdays. The Regulations are complementary to the Parking Places (St. Marylebone) (No. 1) Order, 1959 (S.I. 1959, No. 429) which designates and makes provision as to parking places on certain of those streets at which charges may be made by the St. Marylebone Borough Council for vehicles left in the parking places. The Regulations, other than Regulation 5, apply to those parts of streets in that area not designated as parking places by the Order. Regulation 5 (of which restricts the manner of loading and unloading vehicles) applies to all parts of those streets, whether designated as parking places or not, and at all times. Regulation 2 (which restricts the sale of goods from vehicles) applies at all times except on Sundays. Operative June 24, 1959. ST. MARYLEBONE (WAITING AND LOADING) (RESTRICTION) REGULATIONS, 1959 (S.I. No. 1078) (9d.).

For penalties for contraventions, see Regulation 6 of these Regulations.

The principal Regulations which, as amended, impose restrictions on the sale of goods from vehicles, on vehicles with regard to waiting, loading and unloading and on the use of vehicles for the purposes of advertisements in certain streets in the City of London, in Metropolitan Boroughs and in other districts within the London Traffic Area are further amended. The principal changes are that the restrictions no longer apply in parts of the Borough of St. Marylebone and in part of Oxford Street (which are the subject of separate Regulations, see S.I. Nos. 1077 and 1078, above); and do now apply in part of Regent Street in the City of Westminster. Operative June 24, 1959. LONDON (WAITING AND LOADING) (RESTRICTION) (AMENDMENT) (NO. 2) REGULATIONS, 1959 (S.I. No. 1076) (3d.).

For penalties for contraventions, see Regulation 15 of the principal Regulations (S.I. 1958 No. 660).

Magistrates' Courts

The following Order has been made in respect of petty sessional divisions: S.I. No. 1054 (Northamptonshire) (4d.).

Merchant Shipping

The Merchant Shipping (Life-Saving Appliances) Rules, 1958 (S.I. No. 602), which, inter alia, specify the requirements for lifejackets carried in ships, is amended. The principal changes are (1) it is provided that buoyant material other than kapok shall not be used if its buoyancy would be adversely affected if it was contaminated with oil; (2) a buoyancy test is provided for lifejackets of which the buoyancy is provided by buoyant material other than cork or kapok; (3) provision is made as to the covering of lifejackets whose buoyancy is provided by buoyant material other than cork or kapok; (4) provision is made for the kapok in kapok lifejackets to be contained in envelopes made from polyvinylchloride sheeting, and requirements for such sheeting are specified; (5) provision is made for kapok lifejackets to be covered with laundered and preshrunk cotton material. Operative June 9, 1960. MERCHANT SHIPPING (LIFE-SAVING APPLIANCES) (AMENDMENT) RULES, 1959 (S.I. No. 978) (3d.).

For penalties for contraventions, see section 430 of the Merchant Shipping Act, 1894.

Pests

The principal Order (S.I. 1959 No. 221; [1959] Crim.L.R. 383) is amended by adding Switzerland to the lists of countries from which main crop and new potatoes respectively may be imported into England and Wales. Operative May 23, 1959. IMPORTATION OF POTATOES (AMENDMENT) ORDER, 1959 (S.I. No. 892) (3d.).

Probation

The Probation Rules, 1949 (S.I. No. 1328), are amended. Rule 1 requires the allocation of probation officers to Divorce Courts with a view to assisting them in making orders with respect to the custody, maintenance or education of children. Rule 2 requires a probation officer, if so requested by a court, to act as guardian ad litem in adoption proceedings or to make a report to the court with a view to assisting it in making an order with respect to the custody, maintenance or education of a child; Rule 2 also specifies the arrangements for the selection of a probation officer to supervise a child in respect of whom a court has made an order under section 6 of the Matrimonial Proceedings (Children) Act, 1958. Operative June 18, 1959. PROBATION (No. 2) RULES, 1959.

Revenue

The list of scheduled territories contained in the First Schedule to the Exchange Control Act, 1947, is amended by the deletion of Iraq. Operative June 23, 1959. EXCHANGE CONTROL (DEFINITION OF SCHEDULED TERRITORIES) ORDER, 1959 (S.I. No. 1082) (2d.).

Scotland

It is made an offence to sell, consign or deliver, or import into Scotland any food which contains more than 1·0 part per million of arsenic. Lower limits are specified for beverages, some soft-fruit concentrates and ice-cream, and higher limits are specified for some foods which, generally, are either essences or ancillary foods. Operative August 10, 1959. ARSENIC IN FOOD (SCOTLAND) REGULATIONS, 1959 (S.I. No. 928) (4d.).

For penalties for contraventions, see Regulation 6 of these Regulations.

The Probation (Scotland) Rules, 1951 (S.I. No. 1261), as amended, are further amended by increasing the salaries of all senior probation officers. Operative May 22, 1959. PROBATION (SCOTLAND) AMENDMENT RULES, 1959 (S.I. No. 910) (3d.).

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 11 *New Fetter Lane, E.C.4." The questions of readers only are answerable in the Review. All questions should be submitted in duplicate. The Publishers cannot accept any responsibility for the correctness of the replies.*

59. *Duty of prosecution in calling witnesses*

In a criminal trial is it obligatory on the prosecuting counsel to call all the material witnesses before the court even though they give inconsistent accounts, in order that the whole of the facts may be before the court?

I am aware of such cases as *Adel Mohammed El Dabbah* [1944] A.C. 156, and *R.* v. *Bryant* (1946) 31 Cr.App.R. 146; *Seneviratne* v. *R.* [1936] 3 All E.R. 36 and the more recent case of *R.* v. *Collier* reported in your issue of August, 1958, but would not you agree that these cases deal with no more than the right of the Crown to choose by what witnesses it is to establish or attempt to establish its case. The *ratio decidendi* of these cases, I would submit, merely confers a discretion on the prosecution as to what witnesses they will call and in no way fetter or qualify the obligation of the Crown to bring to the knowledge of the court all material and relevant facts.

Moreover, in the case of a preliminary inquiry on a capital charge would not the duty of the prosecuting counsel to call every witness who can throw any light on the inquiry whether they support the prosecution theory or the defence theory apply *a fortiori*, as the sole object of an inquiry is to see whether a case has been made out against an accused sufficient to put him on his trial before the trial court? And where the prosecution fails to produce a material witness, is not the court justified in making the presumption that if he were produced his evidence would not be favourable to the prosecution? [K. H.]

ANSWER

The cases referred to in the question put to me do in fact almost entirely cover the whole duty of the Crown with regard to the prosecution evidence.

To start at the beginning it is, of course, of the very essence of police duty that they should do everything in their power to find out all possibly relevant information about the crime they are investigating, and this information should be passed to the legal authorities whose duty is to decide what evidence they should call in order to prove their case.

At the preliminary hearing they are under no duty to call witnesses whom they do not believe; as the Court of Criminal Appeal said in *R.* v. *Collier* [1958] Crim.L.R. 544, it would be intolerable if the Crown were compelled to call witnesses whom they did not believe to be witnesses of truth. Indeed, to hold otherwise would mean that the Crown would be obliged to call witnesses whom they regarded as quite certain liars. I do not think this expression of opinion by the Court of Criminal Appeal should be limited so as not to apply to the preliminary hearing. But the Crown are *not* entitled merely to suppress any information they have acquired; it is their duty to inform the defence of the names and addresses of *all* witnesses they have interviewed so as to give the defence the opportunity of calling those people. The Crown are not, however, obliged to hand over or disclose to the defence any statements taken from these witnesses—it is up to the defence to interview the witnesses themselves (*R.* v. *Bryant* (1946) 31 Cr.App.R. 146).

Where, however, the Crown do call any witness at the preliminary hearing the prosecution is then under a duty to make all those witnesses available at the trial; and if the prosecution do not themselves wish to call such witnesses they must nevertheless tender them for cross-examination. The Crown then retains the right to re-examine—see *R.* v. *Woodhead* (1847) 2 C. & K. 520; *R.* v. *Cassidy* (1858) 1 F. & F. 79.

If counsel for the prosecution will not call a witness whose name is on the back of the indictment the judge has a complete discretion to do so—*R.* v. *Simmonds* (1823) 1 C. & P. 84; and see *Archbold*, § 1373, generally.

There are, to the best of my knowledge, no more recent authorities on this subject and the above is the present recognised position in English law. Any of the older inconsistent authorities must now be disregarded. [M. D.]

Letter to the Editor

Pleading guilty by letter—improper inducement

Sir,

It is common practice in Uganda in traffic offences to issue a summons indorsed that the personal appearance of the accused will be dispensed with if he pleads guilty in writing addressed to the court prior to the trial. This is permissible under section 95 of the Criminal Procedure Code. However, the system has certain inherent dangers in cases where a number of counts are included in the one charge. In a recent appeal to the High Court (*A. Sabur* v. *R.*, Uganda Criminal Appeal 29 of 1958) it was held that the offer to accept a written plea of guilty was in fact an improper inducement which rendered the plea of guilty void. The facts of the case were as follows:

> The appellant pleaded guilty in writing in the lower court to a charge of driving a motor-vehicle at a speed exceeding the permissible maximum. He was convicted and fined. The summons contained two counts; one for speeding and the other for reckless driving. On the summons were indorsed the words " Written plea of guilty on count 1 will be accepted in which case count 2 will be withdrawn by police." The appellate court held that this was an improper endorsement as the offence of reckless driving carried a heavier penalty, and the addition of the above words might well be construed by the person summoned as an inducement to plead guilty to the lesser charge with a view to avoiding trial for the more serious offence. The court pointed out that it was a different matter to charge two counts and to withdraw one count in court on the accused pleading guilty to the other. For this reason the appellant's plea of guilty could not be regarded as a free and voluntary one and the conviction was quashed.

R. W. CANNON,
Acting Registrar.

Kampala, Uganda.

Books and Periodicals

Book reviews:

Police. By John Coatman, C.I.E. London: Oxford University Press. 1959. 240 pp. and (bibliography and index) 8 pp. 7s. 6d.

Mr. Coatman's book is described by the publishers as the first attempt to examine the subject of Police " in the round." The author served for a number of years in the Indian Police and there is little doubt that he uses that Force as the criterion by which he judges the British, American, French and German Forces.

His experience of these other Forces appears to be limited to what he has read. Some of what he has read is unfortunately out of date and other parts of his reading he appears to misquote. Bruce Smith's *Police Systems in the United States*, whilst an excellent book, is now dated, and in a country where new ideas are very rapid in their acceptance it is in part obsolete. Again, the quotations from P. J. Stead and Harold Scott are not as well reported as they should be in a work of this nature.

As regards the English system, the author has no time for the small Force at all and he will not even credit it with the necessity or the ability to employ the humble police cadet. He attacks the small Force as a bar to efficiency and even alleges that they were " a potential weakness in the total national war effort." The only thing he can find to say in their favour is that their public relations are good.

His review of the average English traffic department's work is slipshod and he appears to credit the Assistant Commissioner " B " of the Metropolitan Police with the powers and duties of the Local Taxation Department of the L.C.C.

His statement that " patrolling officers are equipped with ' walkie-talkies ' and ' loudhailers ' " presents a fearsome picture of the average English constable, whom we had regarded as only possessing a whistle, a staff and a watch and chain—and, of course, a notebook.

In recommending that chosen police officers should be sent to prescribed university courses to widen their outlook, he appears to ignore recent developments at the Police College with the establishment of the extended Liberal Studies department. In fact, his knowledge of Ryton and Bramshill appears to be nil, as he describes the College as " training in specialist techniques " and elsewhere recommends that American students should " enrol for its courses " as if it were a correspondence academy.

One could forgive Mr. Coatman much for his chapter on " Police and Society." In this, he says a lot of things which needed saying, particularly with regard to the way that the Police are ignored when any review of the penal system is being undertaken. Such latecomers in the field as the probation service are considered to have more experience of the criminal than the service which has been dealing with them daily for so many years and for that matter the whole of the criminal fraternity and not just that percentage suitable for a particular form of treatment. This has always been a matter for amazement, and the way in which the Police Service is treated as a necessary evil with no experience or intelligence to offer in such matters is just frustrating.

The fact that the old-fashioned policeman was a better psychiatrist than some of the highly paid gentlemen who advise the juvenile courts may explain the fabulous increase in the number of cases handled each year by these courts since they were established fifty years ago.

The complete book on " the police in the round " has still to be written, and it will need someone with a more all-round experience of the Police Service to write it than Mr. Coatman. It is to be hoped that when that person does emerge, he will resist the urge to waste valuable space in telling us what he is not going to do and why. This always seems reminiscent of the visitor who is always threatening to go, but is usually the very last to leave!

H. V. H.

Youth Offences at Highfields. By H. Ashley Weeks. Michigan: Ann Arbor. 1958. 208 and (foreword) 18 pp. $6 net.

Highfields, in New Jersey, was established in 1950 to give delinquent boys an opportunity for self-rehabilitation. It is interesting to observe that the New Jersey judges were active in supporting this innovation, which supplied a gap between the committal of a delinquent and placing him on probation.

The scheme is for the short-term treatment of boys still officially on probation who live as nearly normal lives as possible, with no formal education being provided. The essential tool used—which marked it off from conventional treatment facilities—is the dynamic interpersonal group, some of the essential features of which are: voluntary participation, a non-custodial atmosphere, the reinforcement of normal social orientation and the learning of controls by interpersonal communication. The project is limited to boys who have not previously been committed to an institution, excluding sexual perverts, feebleminded and psychotic boys. They are of sixteen and seventeen years of age and the treatment period is for four months. In order to assess what this scheme is accomplishing a study of limited extent was designated. This book, together with some reflections of certain members of the Committee appointed to be responsible for this evaluation, is the result.

The research is based in essence upon the comparison between Highfields and a more conventional correctional reformatory nearby with regard to certain specific factors. The method of research is discussed in a most interesting chapter by Wellman J. Warner.

This book in addition gives a very practical illustration of the benefits which may be derived from the use of what is here called guided group interaction. In principle these group interaction sessions are " only a part though a focal point of attack in managing the interactions of the members of the Highfields Group." The small size of the institution is an important factor.

Highfields does not pretend to be the answer to the problem of institution treatment of juvenile delinquency. This book does show, however, that positive results can be obtained in a few months, at a relatively small cost, with upper teen-age delinquents who are not too firmly patterned in delinquency and not too emotionally disturbed.

T. E. James.

The Badge. By Jack Webb. London: W. H. Allen. 1959. 18s. 303 pp. and appendix and glossary 7 pp.

Subtitled "The Inside Story of the Los Angeles Police Department," this is the latest effort of Mr. Webb, who has already made a steady income by his dramatisation of the work of that department on radio, television and films.

His account is a good factual one, completely without frills. The L.A.P.D., as he calls it, is probably one of the most efficient American police organisations, certainly during the last decade when it came under the leadership of Chief W. H. Parker.

Parker has introduced certain British ideas, in addition to his own improvements and innovations. One can readily understand his determined efforts to rid himself of the Bureau of Corrections, one of the five departments he has under Deputy Chiefs. The idea of the Police being responsible for punishment is as repellent to him as it would be to any British officer.

HUGH DUDLEY.

Books received:

Origins of Crime. A new evaluation of the Cambridge-Somerville youth study. By William McCord and Joan McCord with Irving Kenneth Zola. Columbia University Press. London: Oxford University Press. 1959. 210 and (index) 9 pp. 48s. net.

The Problem of Delinquency. Edited by Sheldon Glueck. London: Oxford University Press. 1959. 1147 and (index) 20 pp. 60s. net.

Readers' digest

Homicide: "Le crime passionel": 103 *Solicitors' Journal* 515.

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Subscribers and others are invited to submit for publication articles and letters on matters of interest within the scope of this Review. They should be sent to the EDITOR, *Criminal Law Review,* 11 *New Fetter Lane, E.C.*4. *Every effort will be made to return drafts or unsuitable copy, but no guarantee can be given in this respect.*

Books for review should be sent to the Publishers at the above address.

THE
CRIMINAL LAW
REVIEW

September 1959

Questioning persons in custody

At p. 673 below we publish a number of letters criticising the decision of Bedfordshire Quarter Sessions in *R.* v. *Powell-Mantle* and the commentary which we published on this case.[1] We also publish Professor Smith's reply to the points raised.

The problem involved is not an easy one. In *R.* v. *Powell-Mantle* evidence obtained by questioning a person in custody about matters *later* the subject of charges for which he was not *then* in custody was held to be inadmissible, it being submitted by the defence that this questioning was in contravention of the Judges' Rules.

Rule 3 of the Judges' Rules reads: " Persons in custody should not be questioned without the usual caution being first administered." Prima facie this rule would seem to allow the questioning of persons in custody when the usual caution has been administered, and this interpretation was put on the rule by the Court of Criminal Appeal in *R.* v. *Booker*.[2] Certain difficulties were, however, stated to have arisen as to how Rule 3 should be reconciled with Rule 7,[3] which reads:

> " A prisoner making a voluntary statement must not be cross-examined and no questions should be put to him about it except for the purpose of removing ambiguity in what he has actually said."

As a result of the divergences in practice arising from this apparent conflict, the Home Office, with the approval of the judges, issued an explanatory circular[4] which contained the following statement:

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[1] [1959] Crim.L.R. 445.

[2] (1924) 18 Cr.App.R. 47.

[3] Royal Commission on Police Powers and Procedure (1928) Cmd. 3297.

> "Rule (3) was never intended to encourage or authorise the questioning or cross-examination of a person in custody after he has been cautioned, on the subject of the crime for which he is in custody."

The circular then goes on to exemplify certain types of questions which are permissible after cautioning a person in custody, which are, however, not directly in point.

Professor Smith, in his commentary on *R.* v. *Powell-Mantle*[5] submits that this Home Office circular casts doubt on the authority of *R.* v. *Booker*. Quite apart from the fact that, as one of our correspondents points out, the case has not been disapproved subsequently, the questioning in that case which was held to be admissible was not questioning on the crime for which the accused was at that time, in custody. We submit that it is carrying the intention of the circular too far to suggest that it was intended to prohibit altogether questioning on offences other than those for which the prisoner is under arrest. Until such time as the prisoner is *charged* with the further offences the questioning of him in respect of those offences is surely governed by Rules 1 and 2.

R. v. *Powell-Mantle*, however, can be regarded as a decision on the facts rather than on the interpretation of the Judges' Rules, for the principal factor leading to the exclusion of the police evidence was the fact that, although the accused was not at the time in custody for the matters about which he was questioned, these matters were closely linked with the charges for which he *was* under arrest in that they all arose out of the accused's employment.[6]

Apart from these facts it is submitted that *R.* v. *Booker*, which does not appear to have been cited on the question of admissibility, should have been followed.

The controversy evoked by the case of *R.* v. *Powell-Mantle* once again draws attention to the unsatisfactory nature of "administrative directions" as a source of law. The inconsistency shown by the courts in admitting or not admitting evidence obtained in contravention of the Rules, and in interpreting them, means that they can no longer be regarded as the simple guide for the police which they were meant to be. This is a subject which could usefully be referred to the Criminal Law Revision

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[4] No. 536053/23 of June 24, 1930.

[5] At p. 448.

[6] [1959] Crim.L.R. at p. 446.

Committee with a suggestion that any necessary rules be embodied in legislation.

Depressing reading

The months of July and August produced a crop of annual reports and annual statistics which, both individually and collectively, paint a depressing picture of crime in this country.

Criminal Statistics, 1958 (Cmnd. 803) show that the rising trend in the total number of indictable offences known to the police that began in 1955 continued steeply throughout 1958, there being a 14·8 per cent. increase on the 1957 figures. The most serious proportionate increases were in robbery, breaking and entering and malicious injuries to property. The increase in crimes of violence was proportionately smaller, while there was a decrease in the number of sexual offences. There were again large increases in the number of persons, both male and female, in the age groups fourteen to seventeen and seventeen to twenty-one, found guilty of indictible offences.

The *Return of Offences Relating to Motor Vehicles* for 1958 (H.C. Paper 238) showed an increase of 29·3 per cent. over the previous year's figures, and is the highest on record.

A light in the gloom is the report on *Offences of Drunkenness, 1958* (Cmnd. 807), this shows a reduction in the number of offences.

The *Report of the Commissioner of Police for the Metropolis* (Cmnd. 800) and the *Report of Her Majesty's Inspectors of Constabulary* (H.C. Paper 202) show a number of problems in common. There is still a nationwide deficiency in strength and Sir Joseph Simpson draws attention to the continued high rate of wastage among young men in the early years of their service.

All forces are concerned with the problems raised by the increasing amount of traffic on the roads, particularly the problem of congestion and the increase in the number of road accidents.

Both reports deal extensively with the problem of relations with the public and Sir Joseph Simpson also deals with press relations and crime prevention publicity.

Finally, the *Report of the Commissioners of Prisons for 1958* (Cmnd. 825) shows a further increase in the average daily population in prisons and borstals, and also an improvement in the recruiting position for prison staff. While the overall picture of our prison system is depressing, one or two notes of hope are contained in the passages on training and after-care. A number of schemes put in hand in different prisons have shown not only an improved atmosphere in the prisons but also a general improvement in morale which is of considerable importance for release and rehabilitation.

With these documents behind it the new Institute of Criminology under Professor Leon Radzinowicz will have many problems requiring urgent consideration.

" Flick " knives

Amongst recent legislation is the Restriction of Offensive Weapons Act, 1959, which is designed to prevent the use of " flick " knives by prohibiting their manufacture, sale or hire or offering for sale or hire or lending or giving or importation. On page 640 we publish an article on this subject by Captain Athelstan Popkess. This and the photographs on pages 643 to 646 can lead only to the conclusion that this new Act is a very small contribution to the problem of reducing violent crimes involving the use of knives. The main weapon against this form of crime must continue to be the Prevention of Crime Act, 1953.

A new purveyor of obscenity?

Section 3 (3) of the Obscene Publications Act, 1959, provides that the court before which obscene articles seized under a warrant are brought " shall order those articles to be forfeited." By section 115 of the Magistrates' Courts Act, 1952, non-pecuniary forfeitures " shall be sold or otherwise disposed of in such manner as the court may direct; and the proceeds shall be applied as if they were a fine. . . ." Should " or otherwise disposed of " be read *ejusdem generis* with " sold "? If so will Charing Cross Road move east to Bow Street?

PUBLISHERS' NOTICE

As a result of the new terms of employment recently negotiated by the printing industry, our costs of production have increased by not less than 7½ per cent.

With great regret therefore we are compelled to increase the subscription for 1960 to £2. The price of individual parts will be 3s. 6d.

Knowledge, Ignorance and animus furandi

By P. B. CARTER, B.C.L., M.A.

Acquiring possession

In 1951 [1] I suggested that much of the difficulty engendered in the law of larceny by the notion of acquiring possession arises from failure to appreciate that the phrase has been used there in two different senses. My thesis was that "a distinction is made between the requisites for acquisition of a possession which is sufficient to be the object of larcenous violation, and the requisites for acquisition of possession, which acquisition itself constitutes the larcenous violation." [2] More particularly I suggested that whereas it is possible to acquire possession of an object in the former sense without knowing of its existence, acquisition of possession in the latter sense does involve some knowledge. To use the same phrase to mean different things obviously invites confusion. Clarity requires that a difference in substance should be reflected in terminological divorce. The phrase "acquisition of possession" is used in the context of becoming a possible victim of larceny in the same way as it is used in many other branches of the law. It is its use in the context of committing larceny that is exceptional. It is here, therefore, that resort ought to be made to other terminology. This has in fact been done by the legislature and (somewhat inconsistently [3]) by the courts. The term that has been used is "taking." The acquisition of possession in the former sense is a constituent of taking, but it is not identical with it, for taking involves a measure of knowledge of what is taken not essential for the acquisition of possession.

Criticism

Recently Professor J. C. Smith has castigated this thesis as "unsatisfactory." [4] But Professor Smith's illustrations of the serious "difficulties in its application" seem to be directed in support of what in fact is a narrow objection. This objection is to the way in which this measure of knowledge of what is taken is described as "knowledge that you possess and knowledge of the major attributes of what you possess."

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[1] 14 Mod.L.R. 27.

[2] 14 Mod.L.R. 27, 28.

[3] For instance, when Lord Goddard C.J. said in *Russell* v. *Smith* [1958] 1 Q.B. 27, 34–35, "I do not think that a man can take into his possession, or come into possession of, a thing of which he has no knowledge," it is clear from the sense and from the context that he was speaking of what is less ambiguously called "taking." Lord Goddard's ensuing *dictum* suggests that the notion may also be relevant in receiving cases.

[4] [1959] Crim.L.R. 226.

This criticism must be considered against a general background made up of the difficulties inherent in formulating the law of larceny and of the considerations which have caused the emergence of the concept of taking as distinct from the mere acquisition of possession. In any law of theft policy requires that there should be some sort of acquisitive behaviour and some sort of intention to deprive. Policy probably requires also that there should be some sort of temporal *nexus* between these two phenomena. The desirability of passage of time having a sterilising effect is recognised in many branches of the law. But the English law of larceny, most people would agree, grossly exaggerates the importance of this latter consideration by demanding precise contemporaneity of the acquisitive behaviour (the taking) and the intention to deprive (*animus furandi*). There is little to be said for singling out any particular time as the moment at which both these two elements must be simultaneously present. But it would be a much greater absurdity to select as that moment a time when in many cases it would in fact be impossible for these two elements to coincide. Such would be the result if the time of the taking were to be a time at which the accused may know nothing of the thing taken.

It is incredible that a man should not be guilty of larceny because he did not intend to deprive his victim of something at a time when he did not know of its existence, although he did form that intention as soon as he discovered its existence. It is scarcely more credible that a man should not be guilty of larceny because he did not intend to deprive his victim at a time when he thought that the thing which he was handling was a stone, although he did form that intention as soon as he discovered that it was a diamond.

The importance of the connection between the question "When did the accused form the intention to deprive?" and the question "When was he first in a position to form this intention?" has often been emphasised. In *R.* v. *Ashwell* Lord Coleridge C.J. said "In good sense it seems to me he did not take it till he knew what he had got; and when he knew what he had got, that same instant he stole it." [5] In *R.* v. *Hudson* Charles J., delivering the judgment of the Court of Criminal Appeal, cited this with approval and said, "Eventually he opened the envelope and he discovered the cheque, a thing which was palpably valuable and which equally palpably belonged to someone else. At that moment, for the first time, he was in a position—in which he had not been before—to form an intent. In effect, he said then and there: 'I am going to appropriate and take away from the owner property which he does not intend to give me and which I do not intend to return to him, but of which I do intend permanently to deprive him.' . . . As soon as he saw what he had got, he made up his mind to steal it. He then did all that was necessary for him to complete the offence of larceny." [6] This in its turn was cited with approval in *Russell* v. *Smith* by Lord Goddard C.J. who re-emphasised the point: "He then formed the intention to appropriate these eight sacks; and that was the first time he could have formed the intention, because until that time he did not know that he had eight sacks more than he ought to have had. It is perfectly true that he knew that he had the actual sacks when he drove off from Crosfields, but so far as he knew, those were the sacks which he had to deliver to Jennings. He could not, therefore, form an intention until he knew that he had in his lorry eight sacks more than he ought to have had." [7]

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[5] (1885) 16 Q.B.D. 190, 225.

If, as is the present law, the accused must at the time of the taking have an intention to deprive, the time of the taking cannot sensibly be a time at which ignorance makes it impossible or highly improbable that he will have such an intention. It is therefore not surprising that the time of the taking has been construed as meaning a time at which the accused has some knowledge of the object of which he intends to deprive his victim. This view justifies decisions such as those in *R.* v. *Riley*,[8] *R.* v. *Ashwell*,[9] *R.* v. *Hudson* [10] and now *Russell* v. *Smith*.[11]

Hypothetical cases

The substance of Professor Smith's criticism is embedded in two hypothetical cases. He writes: "If a thief steals from a pocket in the dark and is apprehended before he knows what he has got, it would be absurd to suggest that there had been no taking—yet the thief never knew the major attributes of the thing he possessed. Similarly, if a thief drove away a lorry intending to misappropriate the contents, it would be absurd to suggest that he did not take until he knew what those contents were." [12]

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[6] [1943] K.B. 458, 461–462.

[7] [1958] 1 Q.B. 27, 32.

[8] (1853) Dears C.C. 149; 22 L.J.M.C. 48; 6 Cox C.C. 89; 20 L.T.(o.s.) 228; 17 Jur. 189; 17 J.P. 69.

[9] (1885) 16 Q.B.D. 190.

[10] [1943] K.B. 458.

[11] [1958] 1 Q.B. 27.

These are cases in which it is in the interests of the prosecution to advance rather than (as has usually been the case) to postpone the moment of taking. It is, of course, easy to agree with Professor Smith that in the cases which he puts, the accused could be found guilty. It is easy, too, to see that this would be inconsistent with the bald statement that an accused does not take until he knows that he has got the object taken and of its major attributes. But, if the thesis thus crudely stated is elaborated in the light of its *rationale*, it deals satisfactorily with Professor Smith's examples.

That an accused does not take until he has some knowledge of what he is taking results from the necessity of his being in a position to form the intention to deprive at the time of the taking. The nature and extent of such knowledge will therefore be conditioned by the nature of the intention to deprive which a particular accused in fact formed. If, as in *R.* v. *Ashwell*,[13] he intended to deprive his victim of a sovereign, he took when he realised that he had a sovereign. If, as in Professor Smith's cases, he decided to deprive his victim of what he abstracted from the pocket (or of the contents of the lorry) regardless of what they were, he took when he realised that he had got something from his victim's pocket (or the contents of a lorry) even though he did not know what they were. One must look to the nature of the intention to deprive. Taking occurs when the accused first had possession and the knowledge necessary for the formation of *that intention to deprive which he did in fact form*.

Limitations

There are two limitations of a more fundamental nature which others might contend must be placed upon the proposition that the accused does not take until he knows that he possesses and knows the major attributes of what he possesses.

The first is that the doctrine, being largely based upon the decision in *R.* v. *Ashwell*,[14] would not be extended to cases in which the accused acquired possession otherwise than by way of delivery. But this contention derives no positive support from the authorities and would introduce another unjustifiable distinction into the law of larceny. Why should an accused who forms the intention to deprive some time after his acquisition of possession, but contemporaneously with his discovery of the nature of what he has got, be guilty if the original acquisition of possession was innocent, but innocent if his original acquisition of possession was a trespass?

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[12] [1959] Crim.L.R. 226. Professor Smith's use of the word " steals " is question-begging.

[13] (1885) 16 Q.B.D 190.

[14] *Ibid.*

Secondly, it might be argued that, whereas taking may be postponed until the accused discovers that what he has is not his, it may not be further postponed until he discovers any other attribute, however fundamental. If an accused acquired possession of someone else's gold ring thinking that he had got his own brass ring, there would, of course, be no larceny. But if later he discovered that the ring was not his own and then decided to appropriate what he thought was someone else's brass ring, he could be guilty of larceny. If he did not form the intention to appropriate until later still when he discovered that it was made of gold not brass, it might be argued that he could not also be guilty of larceny (anyhow without resort to the doctrine of continuing trespass). It is submitted that such an argument would be unconvincing. The justice of the matter is obvious: on this score there is nothing to be said for the view that an accused who, immediately upon discovery that he has an article of great value, decides to appropriate it should be acquitted, simply because he had not formed this intention when, although he knew he had it, he thought it was worthless. Moreover, authority does not preclude the courts from so interpreting " taking " as to lead to the accused's conviction in such a case. Indeed, the decision of the Court of Criminal Appeal in *R*. v. *Hudson*[15] is, to put it at its lowest, consistent with this interpretation. There the accused received a letter which had been posted to him by mistake. There was no evidence that he decided to keep the envelope or its contents until he discovered some time later the nature of the latter —namely that it was not, as he might reasonably expect, merely a written communication but a cheque. His conviction for larceny of the cheque was upheld. If some time before opening the envelope Hudson thought that it and its contents (whatever they might be) were not intended for him, the decision clearly establishes that taking may be postponed until the accused's discovery of some attributes besides the fact that the object taken is not his. But even if, until he found that it was a cheque, Hudson had no reason to suspect that the contents of the letter were not intended for him, there is still room for this broad interpretation. Indeed it receives positive support from what Charles J. (delivering the judgment of the Court of Criminal Appeal) said: "That appears to me to come within the words of Lord Coleridge C.J. in *R.* v. *Ashwell* where he says: 'In good sense it seems to me he did not take it till he knew what he had got; and when he knew what he had got, that same instant he stole it.' That is what the appellant did in this case." [16]

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[15] [1943] K.B. 458.

No doubt there are many attributes which are not sufficiently important for their discovery to give rise to the possibility of a taking. This is a matter of degree and therefore defies precise theoretical definition. But in practice it will probably cause little difficulty. The question to be asked in each case of this sort is as to whether the newly discovered attribute is so fundamental that one can say sensibly (although inaccurately) that finding out about it ought to be regarded as tantamount to finding the thing itself. In *R.* v. *Ashwell* Lord Coleridge C.J.[17] said that the coin was "really discovered" when it was found to be a sovereign.

Finally two variants of Professor Smith's cases may be considered.

Suppose the accused had not at the time of abstracting from the pocket (or driving off the lorry) intended to deprive his victim permanently, but had taken this decision later while still ignorant of the nature of what he had abstracted (or of the contents of the lorry). He would then not be guilty of larceny, unless resort is had to the doctrine of continuing trespass.

Suppose, however, his later decision permanently to deprive coincided with his discovery that what he abstracted was a golden sovereign (or that the lorry contained eight sacks). It is submitted that he could then be convicted without resort to the doctrine of continuing trespass. He would have formed the intention to deprive his victim of a golden sovereign (or eight sacks) at the very first moment that he could form *such* an intention.

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[16] *Ibid.*, at p. 462.

[17] (1885) 16 Q.B.D. 190, 225.

Demerit Points—A New Approach to Driver Control

By *A Canadian Correspondent*

Introduction

On April 1, 1959, an official Demerit Points System for operators of motor vehicles came into effect in the Province of Ontario, Canada. Similar systems were already in operation in the Provinces of Manitoba, New Brunswick and Nova Scotia and in a large number of the States of the U.S.A. and have been accorded considerable publicity in recent years. (See the report "Driver Improvement; The Point System," prepared by the Institute of Government, University of North Carolina, for a full discussion of existing systems.)

The system now drawn up for Ontario is the result of experience gained in recent years in the operation of an unofficial point system under the general powers of the Department of Transport in respect of the issue, suspension and revocation of operators' licences under the Highway Traffic Act (Ontario). From 1956–59 the system was operated as an unpublicised administrative device for locating and dealing with habitual violators of traffic regulations. The Registrar of Motor Vehicles maintained a record of all operators licensed under the Act, and the driving history of each operator was entered on his record. Relevant information was obtained from conviction notices sent in from the courts, and from accident reports filed by investigating officers. Points were assessed upon conviction for certain violations, an extra point being charged if the offence was connected with an accident. When a certain number of points had accumulated, administrative action in the form of an advisory letter or an interview was taken, and in appropriate cases the operator's licence might be suspended under the Minister's statutory power to withdraw licences for any cause he considered necessary. Mandatory suspension of licences was provided for under other provisions, and violations in respect of which action was mandatory took precedence over point system action.

The discretionary nature of the system meant that the administrator could change point values at will and there was insufficient publicity to elicit any degree of co-operation from motorists. A further difficulty arose from the inaccuracy of certain types of source documents. In many instances there would be no actual apprehension of the driver committing a violation ; the law enforcement officer would simply record the licence number of the vehicle involved and lay a charge against the owner of the vehicle rather than against the driver. If the charge was settled out of court by payment of a fine the offence was of necessity charged against the operating record of the owner and it was possible for owners to be debited with violations at a time when they were not driving the car. Driver-owners who were actually guilty of a violation could likewise deny that they were driving, and driver improvement under these conditions was difficult to administer. A recent amendment to the Highway Traffic Act now requires the police in every case to stop the vehicle and secure the name of the driver.

The system in practice

The effect of Ontario Regulations 285/58 is to place the points system on a formal basis and to standardise some of the hitherto discretionary powers of the Department of Transport. A table of points has been drawn up that is intended to reflect the comparative seriousness of various traffic offences. The principle underlying the compilation of the table was expressed recently by the Registrar of Motor Vehicles for Ontario:

" Not all violations are assessed the same number of points. Experience has shown that there is good reason to assume that accidents and violations are correlated, *i.e.*, drivers who have more than the average number of violations will also have more than the average number of accidents. The study of accident causes shows that certain violations are better predictors of accidents than others. A two-year study on this subject, by reference to actual case histories, has just been completed by the Research Institute of the University of North Carolina for the American Association of Motor Vehicle Administrators. The points which will be assessed are based on the findings of the Research Institute as well as on a study of accident causes in Ontario. Thus a conviction of failing to remain at the scene of an accident will be assessed nine points whereas a conviction for speeding at less than 10 m.p.h. over the limit will only be assessed two points." (For full table, see below.)

When a driver is convicted of one of the specified violations the Department is notified and the appropriate number of points are charged against the driving record of the person convicted. It is interesting to note at this point a wide discretionary power vested in the Registrar of Motor Vehicles: if a resident of Ontario is convicted in another Province of Canada or in one of the United States of America for an offence which, in the opinion of the Registrar, is in substance and effect equivalent to an offence for which points would be recorded upon conviction in Ontario, the Registrar may record the demerit points for the conviction in the same manner as if the conviction had been made in Ontario for the equivalent offence.

As points accumulate several levels of action are contemplated, according to the number of points on the record, but points are eliminated from the record after two years and are no longer taken into account.

When a driver has accumulated six points he may be sent a warning letter setting out his record, and advising that any further addition will result in more drastic action being taken against him. The letter is sent in the hope that it will influence the recipient to drive more carefully and lawfully.

When a driver has nine or more but less than twelve points on his record he may be required to attend before an official of the Department to show cause why his licence should not be cancelled. Hearings are to be conducted before specially trained personnel who will endeavour to find the cause of the bad driving record and will attempt to convince the driver that he is capable of better driving. In appropriate cases a further driving test may be given, or a medical examination required, and the driver may be placed on probation, or, if reformation seems unlikely, his licence may be suspended. Matters to be considered by the hearing officer are to include the age of the driver, his occupation, his need for a licence, the number of miles travelled annually and other related circumstances.

An accumulation of twelve or more points results in automatic suspension for a period of three months. Under prior existing law suspension was mandatory upon conviction for drunk driving, driving while ability was impaired and criminal negligence, and also in certain other conditions relating to proof of financial responsibility and ability to pay a judgment for damages resulting from an accident. The new points system now adds the possibility of automatic suspension as a result of a number of minor violations tending to indicate in a driver disrespect for traffic laws and disregard for the safety of other persons on the highway.

The aim of the system

The expressed aim of the points system is to effect driver improvement and a reduction in the number of accidents on the highway by providing a graduated series of deterrents backed by the ultimate sanction of suspension. Time alone will tell how successful the system is in operation, but experience from other jurisdictions has shown that much may be achieved by the education of drivers to a greater realisation of their responsibilities. In Nova Scotia an official recently reported that " we have found that the Point System is not enough by itself but it will have a good long range effect . . . [Its] chief value . . . is that it makes every driver think twice." When allied to the more severe penalties of the Criminal Code there is every reason to believe that the system represents a step forward in the promotion of highway safety. The recording of a fixed number of points in respect of violations without regard to the particular circumstances might suggest a lack of flexibility. A court, in entering a conviction, can take account of mitigating factors by imposing a nominal or a severe penalty as the case may be. In recording demerit points no such latitude is permitted, but the according of a hearing before any suspending action is taken would seem a sufficient safeguard against possible injustice.

Right or privilege ?

The legal aspects of the points system have received little attention, and it is likely that very few issues of importance will arise. The only two cases recorded in America on the subject (*South Carolina State Highway Dept.* v. *Harbin* (1955) 226 S.C. 585, 86 S.E. 2d 466; *Sturgill* v. *Beard* (1957) 303 S.W. 2d 908) concerned point systems created by administrative regulation without express legislative authority, and the decision in each case turned on the constitutionality of the statutory authority relied upon. American jurisprudence has adopted the view that a licence to operate a motor-vehicle is a " privilege " and not a " property right," but the federal courts have since held that, regardless of this classification or terminology, the freedom to make use of one's property, in this instance a motor-vehicle, as a means of getting about from place to place, whether in pursuit of business or pleasure, is a " liberty," which, under the Fourteenth Amendment, cannot be curtailed or denied by a state without due process of law (*Wall* v. *King* (1953) 206 F. 2d 878).

In England it has been held that a cab-driver's licence issued under the London Cab Order was in the nature of a privilege and could be withdrawn by the Metropolitan Police Commissioner without any prior notice or hearing (*R.* v. *Metropolitan Police Commissioner, ex p. Parker* [1953] 1 W.L.R. 1150), although in the particular case it appears that notice and a hearing had in fact been given. The power to grant a licence implies a power to revoke or suspend, and the question will generally be whether the statutory provisions have been complied with. However, an interesting judgment has recently been handed down by the Supreme Court of Alberta affirming the " right " to drive, as distinct from mere privilege. Alberta has a modified driver demerit system whereby drivers convicted of a violation or found negligent in an accident must send the Highways Department proof of financial responsibility before they are permitted to drive again. One Christofferson, an Alberta resident who held licences in both Alberta and Ontario, was convicted of impaired driving in an Ontario Court. His Ontario licence was suspended for three months and the Alberta Motor-Vehicle Branch was duly notified. It, in turn, advised Christofferson that his Alberta licence was suspended for six months, and his insurance agents told him that his policies were being cancelled. The difficulties with the insurers were overcome, and Christofferson advised the Alberta Government of his financial responsibility, but the Department refused to return his Alberta licence. The matter was taken to court, and it was argued for the Department that the Vehicles and Highway Traffic Act defined the " right " to drive as a privilege by providing that the Minister may cancel or suspend any licence for conduct or infractions of the provisions of the Act or on being satisfied that the holder is unfit or " for any other reason appearing to the Minister to be sufficient." It has been considered sufficient in Alberta that a bad accident record, indicating an accident-prone driver, could be cause for the Department to refuse or suspend a licence. Mr. Justice Egbert found that it was the Minister's duty under the law to suspend the licence in this case, but that the suspension was not to be for any definite period—only for the period until the driver produced proof of financial responsibility. He continued:

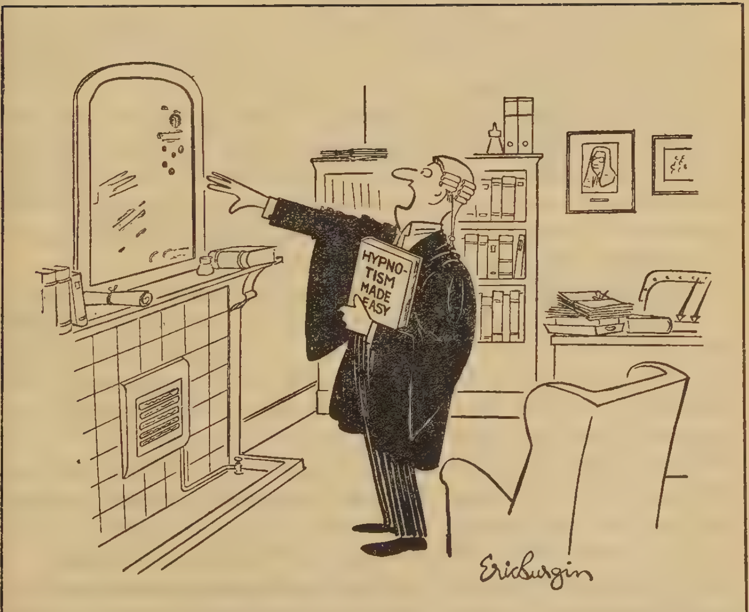
" Since time immemorial, the Queen's subjects have been free to move along the Queen's highways provided only that they kept the Queen's peace. . . . I know of no legislation which has reduced the inviolable right to drive into a privilege to be granted or refused because of the uncontrolled whim of some petty bureaucrat. Because it is my duty to be technically competent to drive, my right to drive is not destroyed, although it may be taken from me or suspended if I fail in the performance of my duty."

It would appear that the learned judge considered that specific provisions in the Act took precedence over general powers, and that any action based on conviction or accident outside the Province must be limited to that authorised by the Act, namely, suspension until proof of financial responsibility was filed. The implications of this judgment could be of general application, since most point systems are based on the general discretionary power of the Minister to suspend licences when he thinks fit. It seems unlikely, however, that such general powers will be affected by the co-existence of a points system, provided that the Minister takes action under appropriate authority properly and clearly delegated by the legislature.

TABLE OF POINTS FOR ONTARIO DEMERIT POINTS SYSTEM

Violation	Number of Demerit Points
Criminal negligence involving the use of motor-vehicle	12
Driving while intoxicated	12
Driving while ability to drive is impaired	12
Obtaining licence by misrepresentation	12
Failing to stop at scene of accident	9
Careless driving	5
Racing	5
Exceeding speed limit by 30 m.p.h. or more	5
Exceeding speed limit by more than 10 m.p.h. and less than 30 m.p.h.	3
Exceeding speed limit by 10 m.p.h. or under	2
Failing to yield right-of-way	3
Failing to obey a stop sign or signal-light	3
Failing to report an accident	3
Improper passing (s. 41 (5*a*) (5*b*) (11) (15) (16), Highway Traffic Act (Ont.))	2
Failing to share road (s. 41 (8) (9) (10))	2
Improper right turn	2
Improper left turn	2
Failing to signal	2
Improper driving where highway divided into lanes (ss. 41 (5) and 42)	2
Driving to left of centre of highway when prohibited	2
Failing to stop for school bus	2
Unnecessary slow driving	2

Violation	Number of Demerit Points
Wrong way on one-way street	2
Following too closely	2
Improper passing of street car	2
Lack of caution meeting animals	2
Improper opening of vehicle door	2
Pedestrian cross-over violation	2



"... and that you find my client—not guilty"

Mr. Sutterthwick's Court

By A. E. Jones, *Magistrates' Clerk*

A Psychiatric Case

Obtaining by false pretences

" I wish the officer would not keep referring to my client as ' the prisoner,' sir. Surely, ' the accused ' would be more courteous —and more accurate ; she has been on bail during the remand and has not yet been sentenced " said Mr. Chaye of counsel, rising in his seat with a great show of outrage.

" ' The accused ' is hardly appropriate as the charges have all been admitted " said Mr. Sutterthwick " And, since she has now surrendered from bail into the custody of the court, she is, I suppose, technically a prisoner. However, if you find the term objectionable, there's no reason why the officer shouldn't call her ' the defendant.' "

" Very good, sir " said both Mr. Chaye and the detective sergeant, but with different intonations.

" Was the false pretence the same in the nine other cases the defendant is asking me to take into consideration, sergeant? " asked Mr. Sutterthwick.

" Yes, sir—substantially the same. All the goods were obtained by pretending she had an account at the store. In some instances she gave the name and address of a customer whom she had heard giving an order ; in the other cases the facts are exactly the same as in the three charges to which she has pleaded guilty —she simply gave a fictitious name and address."

" Her statements were accepted without inquiry, apparently? "

" Yes, sir, except on the last occasion—the charge of attempted false pretences—when the pris . . . er, the defendant's description had been circulated to all assistants with a special warning. The usual policy of the store is not to make any check on account customers when the value of the goods is under £5."

" So she has been able to obtain nearly £50 worth of property dishonestly. . . . I hope the store's methods of doing business don't get too well known," commented the magistrate.

" If I may say so, with respect, sir " put in Mr. Chaye, " It might be a good thing if they got so well known that they had to be changed. It surely isn't right that these tempting articles should be so easily obtainable in this way."

"They would still be easily obtainable by shoplifting; and we expect people to resist that temptation," Mr. Sutterthwick pointed out. Addressing the officer again, he said, "What is known about her?"

The defendant

"Wilma Dartling is a single woman aged twenty-eight, your worship, and has two previous convictions—both for obtaining goods from big stores by false pretences. On the first occasion—three and a half years ago—she was fined £50 and ordered to pay 10 guineas costs. The next time—eighteen months later—she was sentenced to one month's imprisonment. She lives with her widowed mother who has a substantial private income. The defendant left school at the age of eighteen and then took a secretarial course for a year. She has had various jobs, but has done no regular work for some time now. Her mother keeps her well supplied with pocket money and there appears to be no reason for these offences. As you see, sir, she is very well dressed and, when I searched her address, I found that she has a wardrobe full of clothes which her mother satisfied me had been properly bought and paid for."

"I notice that the articles she obtained dishonestly are a very miscellaneous collection—pens, gramophone records, cosmetics, books, dress accessories, ornaments and even some household goods. . . . What did she do with them all?" asked the magistrate.

"Some I found in use at her home, and the rest appear to have been given away as presents, sir," replied the detective sergeant.

"Nothing else you can tell me about her?"

"No, your worship."

"I should like to ask the officer a couple of questions, sir," said Mr. Chaye. "Sergeant, is it within your knowledge that payment in full has since been made for all this property?"

"Yes, sir. That is so."

"Since her arrest, and by her mother, I presume?" said Mr. Sutterthwick.

"Oh certainly, sir," said Mr. Chaye. "All I wish to bring out is that nobody is now a penny the worse as a result of these transactions."

"Except her mother," was the magistrate's comment.

"And she, of course, is only too willing to do anything she can to help her daughter, sir," replied counsel, and turned again to the officer to ask "You must have had a lot of experience, sergeant, of people who commit offences of dishonesty, and of the motives that are usually present. Do the circumstances of this case suggest to you that this young lady is not quite normal mentally? "

"They certainly suggest it to me," broke in Mr. Sutterthwick.

"Thank you, sir," said Mr. Chaye. "I am relieved to hear you say that. It makes my task much lighter."

"I shouldn't be too sure of that," said Mr. Sutterthwick. "People who are not quite normal mentally are still held responsible for their actions, under the criminal law—unless they are insane or mentally deficient; and I presume you are not suggesting either of those conditions in your client? "

"No sir, of course not. But I am suggesting, with respect, that her criminal responsibility for her actions should be regarded as considerably less than that of a mentally normal person."

"There's no law of diminished responsibility in cases of dishonesty—yet, Mr. Chaye."

"I am aware of that, sir. I am not putting it forward as a statutory defence, but as a strong mitigating factor."

"You mean that I should pass a reduced sentence of imprisonment on account of it? "

"I am hoping, sir, with respect, that you will not pass a sentence of imprisonment at all. I am hoping to persuade you that there is a better way of dealing with this young lady—a way more likely to prevent a repetition of these offences. I have evidence available today which will make it clear, in my submission, that this is a case where not punishment but medical treatment is required."

"I have never been able to understand how a medical condition can make a person dishonest, Mr. Chaye. I've heard it suggested often enough—particularly in shoplifting cases—but it has never been explained to me. I trust that the evidence you are calling in this case will be more convincing than some I have heard."

Medical evidence

"It could not come from a more convincing source, sir. I propose to call Dr. Zeitgeistlich who, as you may know, is one of our most eminent psychiatrists and a recognised authority on all disturbances of the mind. But, before he comes into the box, I would just like to say this. I represented the accused on her last appearance before the court, when she was sentenced to one month's imprisonment—a result which, I trust, was not attributable to my efforts on her behalf. The defence was handicapped in that case by the fact that she had not, before her arrest, seen any doctor about her troubles. It was on my advice that, while on remand then, she consulted a psychiatrist. He is, at present, abroad and therefore not able to give evidence here today, but his notes on the case have been made available to Dr. Zeitgeistlich. It appears that, at the time of the previous court proceedings, Miss Dartling was not ready for treatment—simply because she refused to admit the need for it. However, the shock of this present arrest has made her at last realise that she must put herself under medical care if she is not to ruin her life permanently. I say all this, sir, to stress that the medical evidence I am calling really covers the whole of her criminal career—if such it can be termed—and has not just been hurriedly obtained for the purposes of this case, as sometimes happens. . . . Dr. Zeitgeistlich, will you please go into the witness box," concluded Mr. Chaye as he turned towards a dapper gentleman sitting with, and dressed similarly to, the instructing solicitor on the bench behind counsel.

Dr. Zeitgeistlich took the oath expertly and faced the court with the calm assurance of one who, in a world full of inhibitions and frustrations, had, at least, achieved perfect balance and integration in his own personality. Mr. Chaye obtained his witness's acknowledgment that a most impressive list of academic qualifications and hospital appointments represented his official achievements, and then turned to the magistrate to say " Dr. Zeitgeistlich has prepared a written report on this case. If you see no objection, sir, I propose to get him to identify it formally so that it can be handed to you to read. The doctor can then be asked any questions on it that appear necessary. I take it that you will not require it read out, sir? "

Mr. Sutterthwick glanced towards Frell to see whether any technical objection would be made, but the clerk merely said " Section 4 of the 1948 Criminal Justice Act allows you to receive a written medical report on the defendant's mental condition with her consent, sir."

" And she consents through her counsel," said the magistrate.

Dr. Zeitgeistlich duly testified that the two pages of typescript shown to him were his report, and Mr. Sutterthwick studied them in a silence broken only by some shufflings and whisperings at the back of the court where the occupants of the public benches found this part of the proceedings rather dull. Finally the magistrate looked up and said to the witness " It seems to me that much of what is said about the defendant in this report depends on her own statements about herself."

"Yes, zat is so, sir," said Dr. Zeitgeistlich whose English was nearly perfect in grammar and idiom but still retained some Central European characteristics of pronunciation.

"You wouldn't be able to check all those statements, would you doctor?" pursued the magistrate.

"Zere are recognised techniques of verification, sir. I sink I may say I have had considerable experience and practice in getting at zer truce."

"So have I" said Mr. Sutterthwick, "And there are recognised techniques in my line, too. But I'm not always confident that I know what the real truth is when I've finished a case. And my inquiries are usually much more limited in scope than yours, doctor."

Personality disorder

"Zere are, of course, cases in psychiatric practice where zer true position is not easy to be sure of, sir. But zis is, at least in one sense, not really a difficult case. Zer delinquent presents a fairly common kind of personality disorder."

"Do all those suffering from this disorder obtain goods by false pretences?"

"Oh no, not necessarily. Zer outward symptons will vary."

"Why, then, does this young woman's personality disorder lead her to swindle people?"

"I cannot answer zat question in zat form at zis stage," said Dr. Zeitgeistlich with dignity.

"Would you have to be in a position to give treatment before you could give a detailed analysis of the accused's mental condition?" put in Mr. Chaye, feeling that his witness needed some help.

"Yes certainly. Psychoserapy is undoubtedly required," said Dr. Zeitgeistlich, seizing the cue.

"How would that be carried out?" asked the magistrate.

"By question and answer, sir, mainly" replied the witness after a moment's hesitation. "As I've said in my report, zese outbursts of delinquency appear to coincide wiz states of depression, and zer periods of depression appear to be linked wiz zer menstrual periods. What we have to investigate are zese interconnections."

"Do you mean, doctor, that she behaves dishonestly because she is depressed?" inquired Mr. Sutterthwick.

"No sir, *when* she is depressed," corrected the witness.

"I believe that many ladies, when they feel depressed, go out and buy something new—say, a new hat—to cheer themselves up," said Mr. Sutterthwick. "Is it a very different phenomenon in this case—apart from the fact that this young woman obtained new things without paying for them?"

Dr. Zeitgeistlich looked as puzzled by this question as if it had been phrased in Chinese. Mr. Chaye came to his rescue again with "Would it be correct to say, doctor, that Miss Dartling's reaction to depression is an abnormal one and indicates some deep-seated mental disturbance?"

"Yes. Zat is so," said the witness, relieved at this return to a familiar language.

"How long a treatment would be necessary to cure it?" asked the magistrate.

"It is impossible to say at zis stage. It might take a year or two. Zere is resistance on zer part of zer patient to break down. She does not want to be considered a psychiatric case. She is afraid zat a stigma will attach to her. She maintains zat she does zese sings for zer srill of getting somesing for nussing. But zat is unconscious cynicism on her part. In rejecting ozzer motivation of her wrong-doing she is symbolically rejecting parental ausority and social conventions. Under her defensive attitude she conceals fear, resentment, hostility, unhappiness and strong self and ozzer punishing motivations."

It was Mr. Sutterthwick's turn to look as if he were being addressed in Chinese; but all he said was "I gather, then, that sometimes you don't accept what she says about herself."

"Surely, sir, that is the attitude you, yourself, have frequently to adopt towards what you hear in court," said Mr. Chaye, seeing scope for another forensic intervention.

"You are quite right, Mr. Chaye. I wasn't criticising Dr. Zeitgeistlich for it" remarked the magistrate, and turned again to the witness to say "Until she was cured by your treatment, I suppose she might commit other offences?"

"Zere might be relapses, as wiz any illness," agreed the doctor, a little reluctantly.

"Why wouldn't prison be a suitable treatment in this case? She couldn't commit other offences then," pursued Mr. Sutterthwick.

"He's worse than old X" murmured Mr. Chaye bitterly to his instructing solicitor, naming a much respected High Court judge.

"I am sure it would have no permanent deterrent effect," replied Dr. Zeitgeistlich confidently.

"Why not?"

"Well, it didn't last time, sir," pointed out the psychiatrist.

"Perhaps it wasn't long enough. After all, you want one or two years for your treatment. Supposing she had a prison sentence of that length, mightn't that cure her?"

Dr. Zeitgeistlich seemed, for the moment, bereft of words at the shockingness of this suggestion. But when he did speak it was with the mild forbearance of a missionary to the heathen. "A prison sentence, sir, would only increase her depression and so would increase zer likelihood of a repetition of zis behaviour pattern," he explained.

"Well, I suppose everybody sentenced finds imprisonment depressing," said the magistrate. "That would be an argument for not sending anybody to prison."

"I don't sink zat medical opinion would ever recommend it as a treatment. It is rarely in zer best interests of zer patient."

"I have to consider other interests besides those of the patient," said Mr. Sutterthwick.

Mr. Chaye decided that the turn things were taking urgently demanded interruption by him. "Does it amount to this, Dr. Zeitgeistlich, that in this young lady's case the offences are closely related to states of depression, and that that is a recognised medical condition—though it is not found in every offender by any means?" he asked his witness; and received the reply: "Yes certainly; it is well recognised. We do not yet understand zer connection fully but research is going on all zer time."

"And would I be summarising your views fairly by saying that medical treatment offers a real hope—and the only hope—of a permanent cure in this case, and so is in both the accused's and the public interest?" continued counsel.

"Yes certainly," was the psychiatrist's reply.

"But he's not the judge of the public interest. I am," protested Mr. Sutterthwick.

"Oh, I entirely agree, with respect, sir," said Mr. Chaye. "I only wished to clear up the effect of Dr. Zeitgeistlich's evidence.

"I think I understand it so far. . . . Doctor, I suppose you would agree that she knew she was doing wrong and that she is responsible for her actions?"

"In law, yes," said the witness in a way which showed pretty plainly his opinion of that law.

"As an expert in these matters, doctor," put in Mr. Chaye desperately, "are her actions, in your view, the consequence of her medical condition?"

"Yes certainly; zey are determined by it."

Second opinion

"I think I'd like the prison medical officer's opinion on this case—particularly with regard to her own statement that she does this sort of thing for the thrill of getting something for nothing," announced the magistrate.

Mr. Chaye, with the look of a man whose worst fears have been realised, said "If you require another opinion, sir, the defence undertake to make this young lady available to any other doctor, and to pay any fees incurred. As you know, sir, you have the power under section 26 of the Magistrates' Courts Act to remand her on bail with a condition that she be medically examined. I would strongly urge you, with respect, sir, to use that power in this case and so mitigate to some small extent the distress of this young lady who, whatever her past record, is not, in ordinary parlance, a criminal. A week in prison on remand at this stage will cause great mental suffering both to her and to her mother; her mother's health has already been affected by anxiety over this matter. . . . We will send her to any other psychiatrist you care to name, if you allow her out on bail, sir."

"I'm afraid I don't know any other psychiatrist except the prison one," said Mr. Sutterthwick. "No, Mr. Chaye, I can't give bail in this case, now that I've heard the full facts."

"Stand up, please," murmured P.C. Mure, the assistant gaoler, to the defendant as the magistrate looked towards her to announce his decision.

"You will be remanded seven days in custody for a medical report," said Mr. Sutterthwick.

Wilma Dartling uttered a moan and then appeared to faint, but it was noticeable that she lay rather stiffly in Mure's arms as he carried her out.

Offences under Sections 11 and 12 of the Road Traffic Act, 1930

By Keith C. Clarke

Prosecuting Solicitor, Southampton Corporation

4. Duties of the driver

In the last article in this series, we were dealing with the case law relating to the duties of a driver in various circumstances, and the following matters remain to be considered:

Duty of driver when overtaking

The civil case of *Joseph Eva, Ltd.* v. *Reeves* [1] has already been referred to in the last article. In that case, X, a motorist, entered a road junction in compliance with the traffic lights, which were green in his favour, and collided with another vehicle which had entered the crossing at right angles to his own vehicle when the appropriate lights were showing red. When X was approaching the junction, the nearside of the road was impeded by other traffic which was stationary, so he pulled out on to the offside of the road and overtook this traffic as it was starting to move forward. It was found that, in doing so, X did not endanger any traffic lawfully using the junction. X was found not to have been negligent in the circumstances, but one of the points put forward in supporting the argument that he had been negligent was that he had overtaken at a cross-roads, contrary to rule 34 of the Highway Code (now rule 29, which says "*do not overtake at or near—a road junction*"). Sir Wilfrid Greene M.R. pointed out that this rule is an obvious canon of good driving, where cross-roads are not controlled by traffic lights or by the police, since overtaking at such cross-roads involves a risk to other traffic lawfully on the highway. However, he went on to say that at controlled cross-roads the traffic in whose favour the lights are showing has the monopoly of the crossing, and that it is quite common for vehicles in the stream of traffic set free by the green light to overtake slower-moving vehicles travelling in the same direction. Such overtaking would, he said, be quite proper, provided that other traffic lawfully using the junction was not endangered, *i.e.*, traffic coming in the opposite direction and traffic turning to the right. In the Canadian case of *Rodgers* v. *Wainwright*; *Nelson* v. *Wainwright*,[2] it was laid down that the driver of a motor-car who is attempting to pass another vehicle travelling in the same direction has certain grave responsibilities, *viz.*: (i) He should look carefully for oncoming vehicles; (ii) If there are any, he should ascertain their distance away and be sure he has time to pass and resume his position on the correct side of the road before they arrive; (iii) He should observe the width and condition of the road and anything likely to limit the movements of any of the vehicles on the road; and (iv) If he cannot pass in safety, he should drop back.

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[1] [1938] 2 All E.R. 115; 102 J.P. 261.

Driver making an error of judgment

The vague expression " error of judgment " is often used by defending advocates in these cases as if it was a magic formula. When the facts proved indicate that the defendant has not been using proper care, then that is an end to the matter and the magistrates may properly convict of an offence under section 12, even though this lack of care is due to something which could be described as an " error of judgment " on the defendant's part, *e.g.*, where the defendant has turned into a road on his right in the face of oncoming traffic in the mistaken belief that such traffic is far enough away to enable him to execute the manoeuvre in safety. On the other hand, a driver who is confronted with a sudden emergency, which has arisen through no fault of his, may well become involved in a difficult situation as the direct result of an " error of judgment " which he commits in " the agony of the moment," *e.g.*, turning left instead of right. In such a case, it would be proper to dismiss any summons against him under section 12, since he has done all that could reasonably be expected of a driver in those circumstances. It follows that the test is not whether the defendant has committed an " error of judgment " but whether he has, in fact, driven with reasonable care, and if it is found that he has not done so then he may properly be convicted of an offence under section 12, irrespective of whether he has committed an " error of judgment." Similarly, he may be convicted of an offence under section 11 if he has, in fact, driven his vehicle dangerously.[3] Whilst the standard of care expected of a driver is the same in criminal as in civil law, it must be remembered that contributory negligence is not a defence to proceedings under sections 11 and 12. Generally speaking, it will be a defence in such proceedings if it can be shown that the traffic incident complained of was *entirely* due to the fault of the other driver or pedestrian concerned, but the fact that it was *partially* due to the fault of the other driver or pedestrian will be no defence but merely a matter to be urged on the defendant's behalf in mitigation. Again, in criminal proceedings the court will only be interested in the question of damage to vehicles and injury to persons in so far as these matters throw some light upon the direction in which the defendant's vehicle was being driven, its position in the road and its speed, etc. Comment is made in 122 J.P.N. 593 about the waste of time occasioned by virtue of the fact that, in many proceedings under sections 11 and 12, the defence is often conducted with one eye on the possibility of subsequent civil action.

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[2] (1933) 3 W.W.R. 620.

It has already been mentioned in the last article that section 12 creates two separate offences and section 11 creates three separate offences. With regard to the two offences created by section 12, it will often be found that, where it can be shown that a driver has not exercised proper care and attention, a conviction will be justified for *driving without reasonable consideration for other persons using the road*. Similarly, where it can be proved that a driver has not shown consideration for other road users, the facts will invariably justify a conviction for *driving without due care and attention*. Thus, these two offences, which cover an enormous field, overlap, but there is one most important distinction between them which must be borne in mind, *viz*., a person can be guilty of careless driving even though nobody else is using the road at the time, whereas it is essential to show that other persons were using the road if he is to be convicted of driving without reasonable consideration. Also, there are certain cases where, although the incident complained of arises from want of care and attention on the defendant's part, a conviction for driving without reasonable consideration for other persons using the road is more appropriate on the facts.

The dividing line between *driving without due care and attention* under section 12 and *driving in a manner dangerous to the*

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[3] See *Simpson* v. *Peat* [1952] 1 All E.R. 447; 116 J.P. 151 and the explanation therein of *R.* v. *Howell* (1938) 103 J.P. 9.

public under section 11 has always created considerable difficulty, and much has been written upon the subject. Clearly, a motorist who has not exercised reasonable care will be guilty, at least, of an offence under section 12, but a higher degree of negligence must be proved to establish dangerous driving under section 11. At one time, the view was widely held that proof of a deliberate act, as opposed to mere inadvertence, was required for dangerous driving, but it has now been established that this is not the case. In *R.* v. *Parker*[4] the Court of Criminal Appeal upheld a trial judge's direction to the jury that *the momentary disregard of safety precautions* or *a momentary act of negligence* on the part of a driver could amount to dangerous driving. The prosecution in this case was for causing death by dangerous driving, under section 8 of the Road Traffic Act, 1956, and the appellant had driven his car over a road junction contrary to the traffic lights, which were showing red against him. The appellant had first said that the lights were green, but when told that they were not he said that he must have been mistaken. In *Hill* v. *Baxter*,[5] the Divisional Court held that, so far as the offence of dangerous driving is concerned, section 11 enacts an absolute prohibition and that "*mens rea*" is no part of the offence. Thus, in the words of Lord Goddard C.J., it is no answer to a charge under this section to say: "I did not mean to drive dangerously." Since the test is purely objective and proof of "*mens rea*" is not necessary in the case of dangerous driving, there would seem to be little point in prosecuting for *reckless driving* because in such a case the test is subjective, and it follows that proof of some foresight by the defendant of the likelihood of certain consequences must be forthcoming. Reckless driving is, of course, one of the three separate offences under section 11, but only carries the same penalties as the other two offences of driving in a manner dangerous and at a speed dangerous to the public.

The questions of whether in the circumstances an offence has been committed and, if so, whether the offence is one under section 11 or 12, are pure questions of fact to be determined by the magistrates, and their findings in this respect will not be upset by the High Court unless it appears that those findings are perverse. If the prosecution are considering taking a matter under section 12 to the Divisional Court, by way of case stated, they would do well to first consider the decision and judgments in *Gibbons* v. *Kahl*,[6] where the High Court dismissed such an appeal and Lord Goddard C.J. said: "This court never views with particular favour the police bringing an appeal on a question whether a person drove with due care and attention, because it is so essentially, as a general rule, a question for the justices." He went on to say: "We are bound by the facts found by the justices, and we can only go against those facts if we come to the conclusion that the justices are perverse, which may mean that they are not fit to be justices at all, or that they have taken into account matters which they ought not to have taken into account or shut their eyes to the obvious." The decisions in *Chapman* v. *Hobrough*[7] and *Thompson* v. *Wigley*[8] are further examples of the High Court dismissing appeals by the police against persons acquitted by the magistrates of offences under section 12. In the last-mentioned case, the circumstances were such as normally justify a conviction under section 12 (*i.e.*, the defendant had turned right, across the road, when there was oncoming traffic), but the Divisional Court, in refusing the appeal, said that it was essentially a matter for the justices who saw the witnesses and knew the locality. On the other hand, if an appeal by way of case stated is contemplated, in view of the dismissal by the magistrates of a summons under section 11, reference may usefully be made to the following cases, in which the Divisional Court had no hesitation in saying that magistrates, who had dismissed cases under section 11, had acted perversely in view of the evidence before them: *Kingman* v. *Seager*,[9] where a heavy motor lorry was driven along a road, passing a bend, a cross-roads and a converging road at between thirty and forty miles per hour; see also *Durnell* v. *Scott*,[10] where a loaded furniture van was driven along a road, passing five converging roads, one cross-roads and ten bends at speeds up to fifty miles per hour; *Bracegirdle* v. *Oxley*,[11] where a heavy lorry was driven along a road, passing two bends, one converging road, five farm entrances and one narrow bridge at between forty and forty-five miles per hour; and *Baker* v. *Williams*,[12] where a motor-cycle was driven along a road carrying heavy traffic at sixty-four miles per hour. It overtook a car which was itself passing a moving bus and in doing so drove six feet over to the offside of the centre of the road; and see also *Squire* v. *Metropolitan Police Commissioner*.[13] In all, except the last, of the above-mentioned cases, the High Court directed convictions for driving at a dangerous speed under section 11. Indeed, it seems that the High Court will more readily direct magistrates to convict of offences under section 11 than it will of the less serious offences under section 12.

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[4] (1957) 121 J.P.N. 330.

[5] [1958] 1 Q.B. 277.

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[6] [1956] 1 Q.B. 59. In the last article in this series, the case reference was quoted "[1955] 3 All E.R. 345" since that report deals fully with the driver's duty when approaching a pedestrian crossing. It does not, however, deal with the first question the court considered in this case, *viz.*, the appeal against the magistrates' acquittal of the charge under s. 12, whereas the report now cited does.

[7] [1955] Crim.L.R. 786.

[8] [1956] Crim.L.R. 205

[9] (1938) 101 J.P. 545.

[10] [1939] 1 All E.R. 183.

[11] [1947] 1 All E.R. 126.

[12] (1956) 54 L.G.R. 197.

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[13] [1957] Crim.L.R. 817.

[*To be concluded.*]

"*Flick*" *Knives*

By Captain Athelstan Popkess, C.B.E.,

Chief Constable, Nottingham City Police

We are not sure where "flick" knives originated. It may have been in the United States of America—perhaps in Chicago! For did not Dickens tell us in *Martin Chuzzlewit*, published as far back as 1842, and just after his return from his American tour, that one Scadder, a rascally real estate trickster, "picked his teeth with a sort of young bayonet that flew out of his knife when he touched a spring"?

Some states in the U.S.A. have now legislated against such knives. New York State, for instance, in 1956 barred their possession except on licence, and in 1958 barred them altogether. And no wonder, for the number of stabbings had reached alarming proportions and were still rising. Last year U.S.A. Federal law banned inter-State commerce in flick-knives.

There has also been administrative action against flick-knives and stilettos in Sweden, since January 1957, pending consideration of further legislation on the subject. Incidentally, the Italian ones have been imported principally for use as paper knives. So far as the Board of Trade in the United Kingdom are concerned, they have made it clear that they would only ban their importation if the knives were banned in this country as a Home Office measure.

Does the carrying of these knives constitute a serious problem in this country at the present time? It will be recalled that at least two cases of injury inflicted with such weapons recently have resulted in death, and that Mr. Justice Streatfeild expressed the view in each case that such knives should be banned.

Of the chief officers of police—including the Metropolitan Police Commissioner—communicated with as to the desirability of banning their sale, 50 per cent. did not think that such a ban was either necessary or desirable; 25 per cent. were of the opinion that such a ban was desirable in some form; 15 per cent. did not express any view either way; and 10 per cent. thought that a partial prohibition, making suitable allowance for trade use, would be workable.

What the situation is in the U.S.A. in this respect the present writer does not know—but so far as the United Kingdom is concerned, there would be considerable difficulty in operating only a partial prohibition.

It can be accepted that partial prohibition would not work in this country. It would be difficult to limit sale by trades, especially as young workmen change their trades or slip into unemployment. Limitation by age would be ineffective, the persons said to misuse these knives are to a large extent of working age—gangs of youths aged seventeen and upwards.

Prohibition of flick-knives

A total prohibition of sale would be necessary. But among the difficulties to achieve this, is the fact that such knives could still be brought in by youths returning from holidays abroad. They could also easily be brought in by seamen. Although, in practice, prohibition would obviously reduce the number of flick-knives in circulation, those that were available would be in considerable demand among undesirable elements, for their prestige value if for nothing else.

As a matter of interest, flick-knives are not manufactured in this country but are all imported. The German article is generally a useful knife. The Italian one, on the other hand, has no cutting edge but is exclusively a stiletto—it is only fair to say, however, that many of these are only meant to be used as paper-knives.

Few chief constables are of the opinion that workers would be seriously handicapped if the sale of the knives were banned altogether. Fishermen, on the other hand, commonly use them ; as do many miners and agricultural workers. But, in general, mining, farming and fishing areas report little or no use being made of these knives by tradesmen. One chief constable points out that if their use was really essential, British manufacturers would have been making them long since.

In these circumstances, a reasonable judgment would be that the knives are favoured by some workers in some trades—but are not essential to them. That a ban would be inconvenient rather than detrimental.

The case for banning them is much strengthened by the fact that the very nature of the knives suggests sudden violent action with a concealed weapon—whereas the act of drawing a knife from a sheath for an offensive purpose, or having to open it first like an ordinary knife, does give warning of an attack.

Action under the Prevention of Crime Act, 1953, cannot be taken until something has happened which will bring the knife under the heading of " offensive weapon." The defendant has only to raise even a small doubt in the mind of the court, by claiming that he carried the knife for legitimate purposes of his trade, etc.

By and large, the number of cases of injury deliberately caused by flick-knives may not be large. On the other hand, the view has also been expressed that if there were none available, the injuries would not have occurred. In Nottingham, for example, of the twenty-two cases in which offensive weapons were used in 1958, in only one instance was it a flick-knife.[1] And during the past three years there have been only two cases of wounding involving the use of flick-knives, compared with the sixty cases in which offensive weapons of other types were used.

To sum up the case for or against the banning of flick-knives. They should be banned because: (i) they are attractive to a certain type of youth; (ii) they are easily concealed and easily brought into action; and (iii) they are therefore more likely to be used in the heat of any argument than an ordinary knife which required to be opened first, and thus gives time for reflection.

The case against banning can be summed up by the facts that: (i) there is at present insufficient evidence that these knives have been used illegitimately on a sufficiently large scale to warrant such action; (ii) other equally offensive and dangerous weapons are frequently carried—and used to cause injury to persons[2]; (iii) prohibition on sales would doubtless lessen the number of flick-knives in the country, but it is unlikely that it could stop their circulation from ports and into wrong hands—moreover, their scarcity value would be likely to attract a certain type of youth; (iv) there is no reason to believe that, with flick-knives difficult to come by, gangs of youths would necessarily carry sheath knives instead, for instance; (v) if there were a total prohibition of the sale of flick-knives in this way in this country, it would handicap legitimate users (it should be borne in mind in this connection also, that we have so far heard the views only of those who think it in the public interest to ban flick-knives—but little from those people, of whom there certainly are some, who find such knives convenient in their trades); (vi) adequate provisions to deal with flick-knives and offensive weapons already exist, under the Prevention of Crime Act, 1953 (for it can be advanced that the real solution is to tackle those who wrongfully use flick-knives—not the weapons themselves. It will be recalled that both the Home Secretary and the President of the Board of Trade have appealed

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[1] See Figure 1.

[2] See Figure 2.

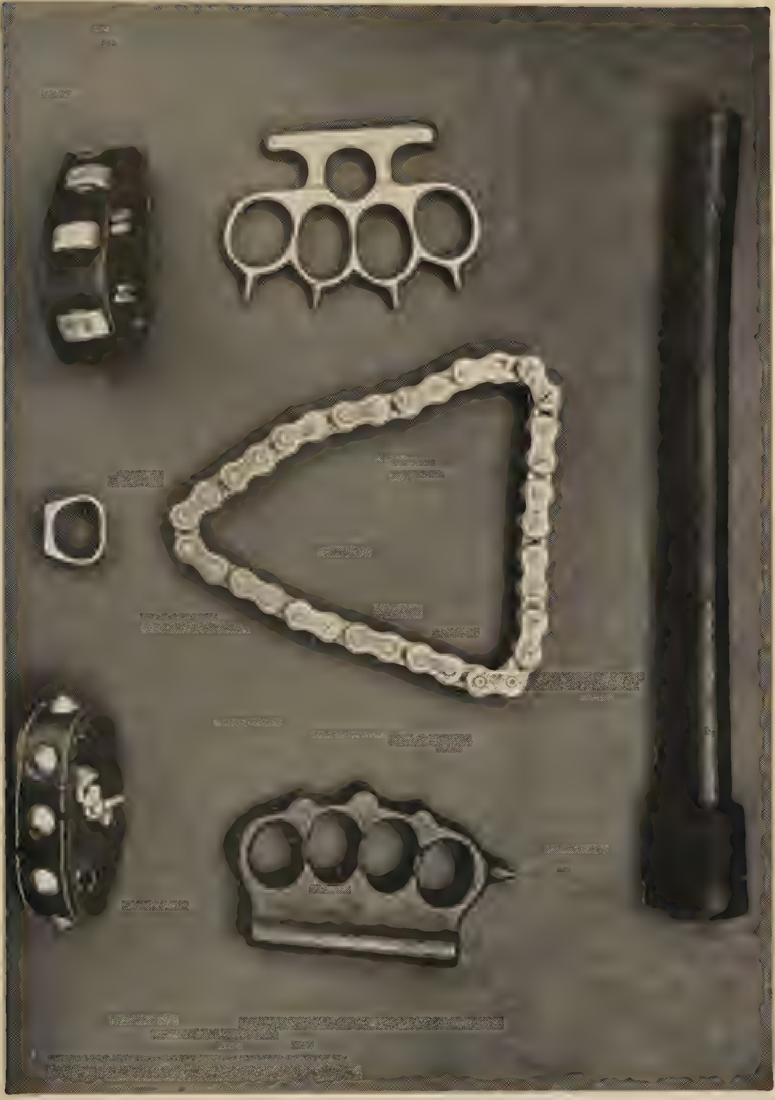

FIGURE 1.—Weapons actually used in offences of violence in Nottingham.

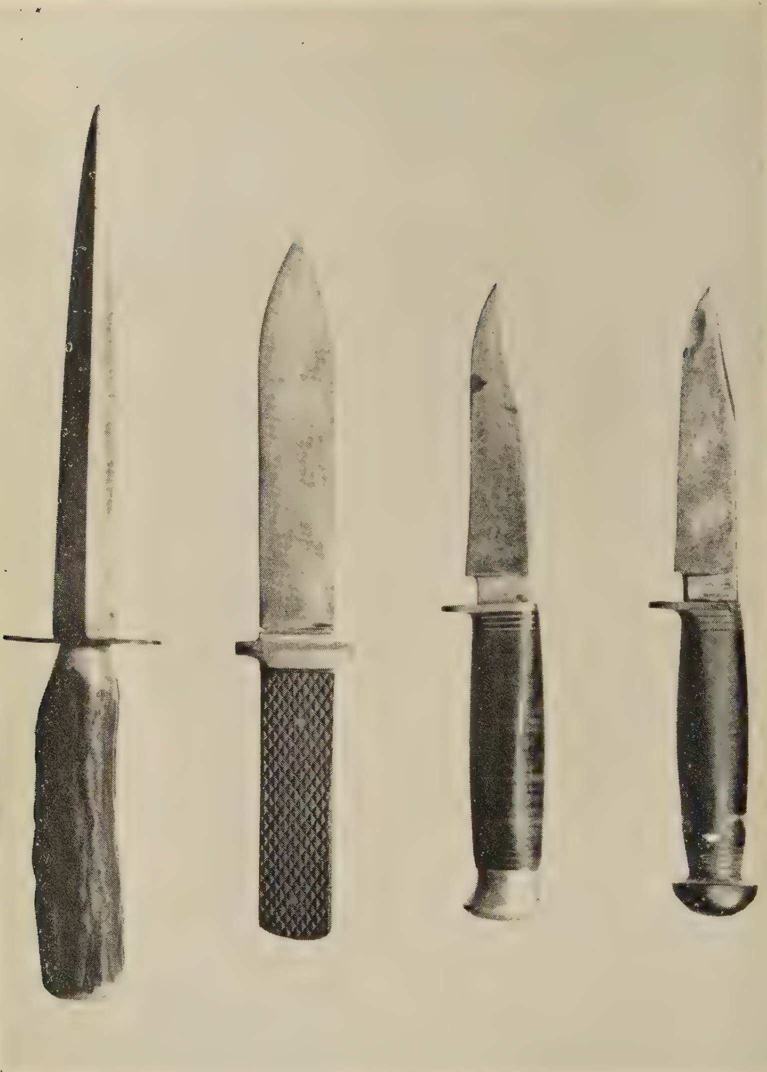

FIGURE 2.—Dangerous offensive weapons which figured in court proceedings, but the possession of which will not constitute an offence under the Restriction of Offensive Weapons Act, 1959.

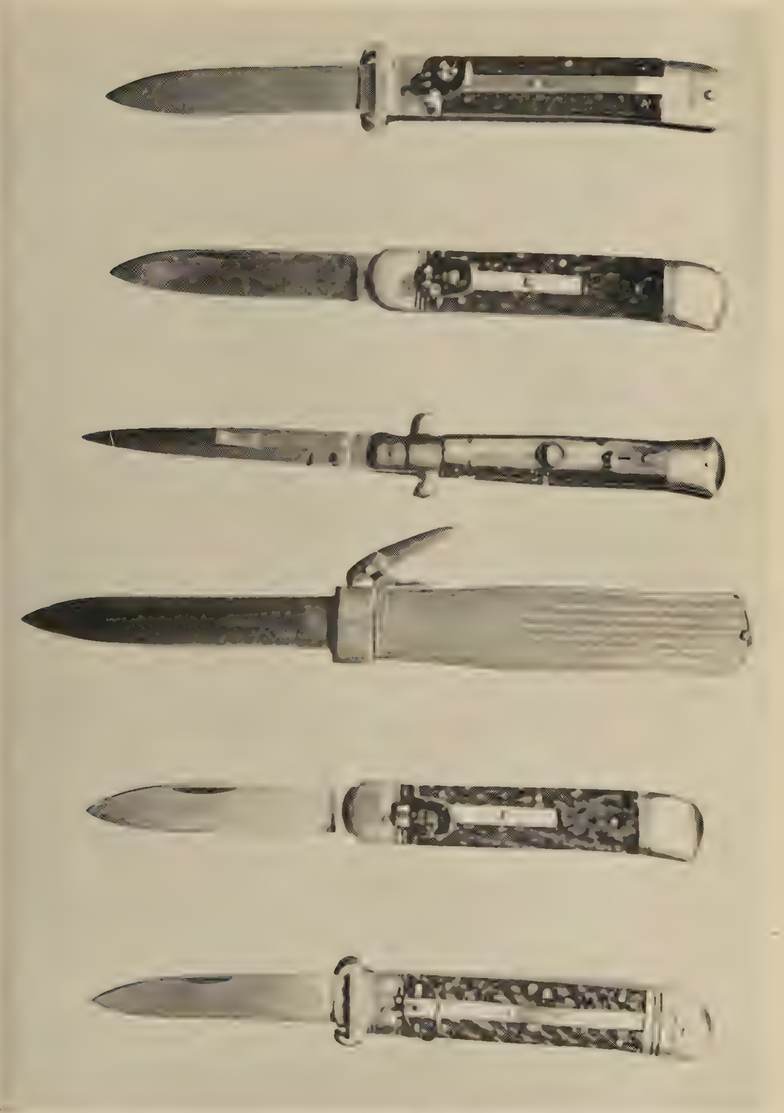

FIGURE 3.—Typical flick-knives, which have figured in court proceedings—the future sale or possession of which will be an offence under the Restriction of Offensive Weapons Act, 1959.

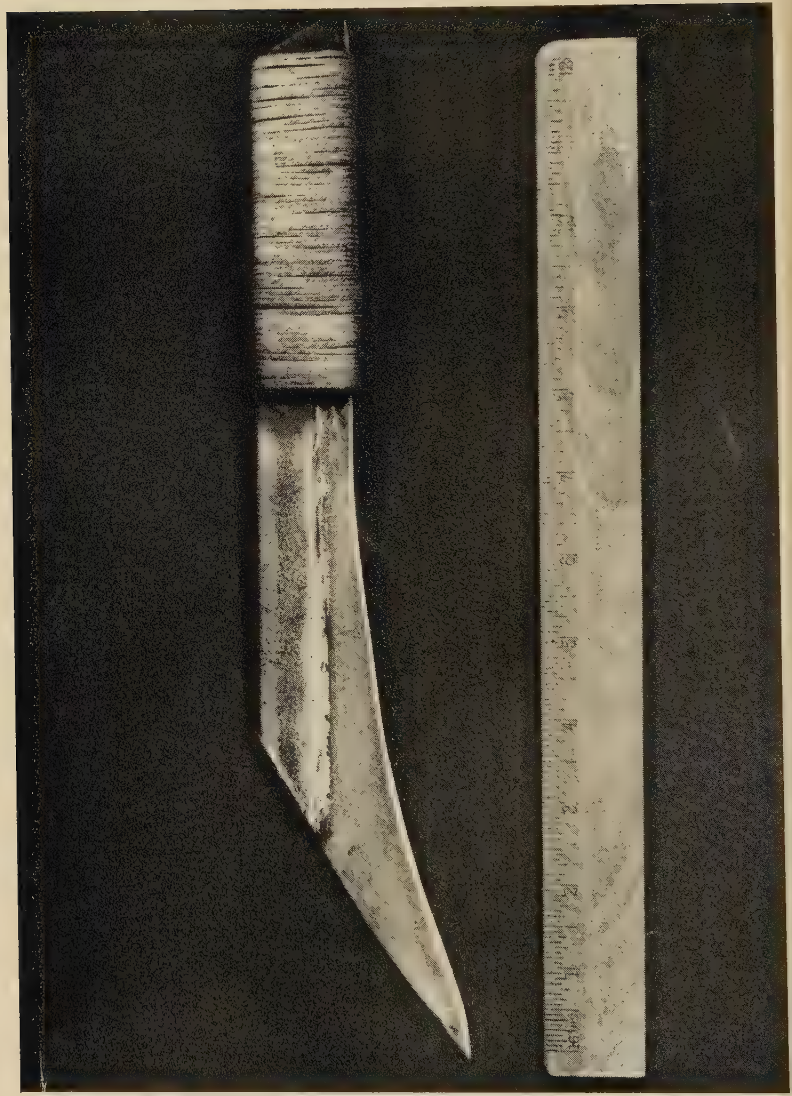

FIGURE 4.—This weapon, as sharp as a razor, was made from a scythe and it caused a serious stomach wound. Its possession is no offence at present.

to traders to sell flick-knives only to persons known to have a legitimate use for them. Although there are exceptions, the police information is that many traders have tried to co-operate in this way); (vii) the campaign against flick-knives has been caused more as the result of press publicity than general public concern. On the other hand, the press publicity may have originated from such public concern—we do know, for example, that certain women's societies have expressed strong views against the carrying of such knives by youths. A number of Members of Parliament have expressed similar views. Also, the Association of Municipal Corporations, as recently as December 4, 1958, passed a resolution recommending legislation.

The Restriction of Offensive Weapons Act, 1959

Among the Members of Parliament who have given the matter much thought has been Mr. Janner (Leicester N.W.), which he has expressed mainly by means of parliamentary questions—eventually introducing a Private Member's Bill under the ten-minute rule. Before the second reading of this Bill, a resolution had been put down, and signed by some three hundred Members of Parliament of all parties, asking that the matter be debated. Similar views were expressed in the House of Lords.

The Government replied that if Members wanted such a Bill they would not oppose it; although they made it quite clear that they did not think it would be much good in practice—but hoped it would do no harm.

The Bill accordingly received the Royal Assent on May 14, and under the short title of the Restriction of Offensive Weapons Act, 1959, enacts that:

> " 1.—(1) Any person who manufactures, sells or hires or offers for sale or hire, or lends or gives to any other person—
>
> (*a*) any knife which has a blade which opens automatically by hand pressure applied to a button, spring or other device in or attached to the handle of the knife, sometimes known as a ' flick knife ' or ' flick gun '; or
>
> (*b*) any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force and which, when released, is locked in place by means of a button, spring, lever, or other device, sometimes known as a ' gravity knife,'
>
> shall be guilty of an offence and shall be liable on summary conviction in the case of a first offence to imprisonment for a

> term not exceeding three months or to a fine not exceeding fifty pounds or to both such imprisonment and fine, and in the case of a second or subsequent offence to imprisonment for a term not exceeding six months or to a fine not exceeding two hundred pounds or to both such imprisonment and fine.
>
> "(2) The importation of any such knife as is described in the foregoing subsection is hereby prohibited."

Evaluation of the Act

The present writer's opinion of this Act is that it is good as far as it goes—but does it go far enough? There are other offensive weapons, equally dangerous ones in the wrong hands, that the provisions of the Act do not touch. For example, some of those in the accompanying illustrations—all of them taken by the police from individuals in Nottingham, under circumstances in which no prosecution was possible under the Prevention of Crime Act, 1953. The knives in Figure 3 are covered by the Act, but none of the others are. Figure 4, made from a scythe and as sharp as a razor, actually caused a serious stomach wound—it could just as easily have cut off anybody's head!

Would something on the lines of the Police Ordinance in Hongkong have been more effective? This covers: "Every sword, cutlass, spear, pike, bayonet, dagger, fighting iron, or other deadly weapon." And it provides for a magistrate, upon request in writing from the Commissioner of Police, to order that the weapon be destroyed by the police; whether any person has been, or could be, convicted of any offence against this section, or not.

The Hong Kong Police Ordinance also provides that to possess a "deadly weapon," such as a flick-knife, dagger, etc., the would-be owner must first obtain from the Commissioner of Police authorisation to possess it, on somewhat similar lines to the certificate now issued by chief constables in the United Kingdom to persons who wish to possess a firearm.

Legislative action against flick-knives came into force in the United Kingdom on June 14. If, as many people think, this type of knife really is a public menace—it is surprising how long it has taken to realise it and bring in the necessary legislation to deal with the matter. Whether we agree with the Act or not, crimes of violence, particularly stabbings and slashings, have steadily risen in recent years. Yet when the campaign against these dangerous weapons began some four years ago, it received little encouragement in the House of Commons.

But public opinion against them gathered strength when two High Court judges urged the need to deprive youthful offenders of these potentially dangerous weapons of assault. One of them, Mr. Justice Salmon, commented: "The flick-knife now appears to be regarded by many teenagers as a badge of manhood."

In a recent case at the Nottinghamshire Assizes, after hearing how an 18-year-old youth had bought a flick-knife—on his own admission, "because he thought he would get some money"—and had then assaulted two women with intent to rob them, Mr. Justice Havers said, when passing sentence on him: "I have read the statement you gave of how you came to commit these offences. I have never been more horrified at this stark crudeness."

We also remember reading, not long since, of the incident at Watford, during which teddy boys were using milk bottles, etc., as weapons, and that when a police sergeant called upon the public for assistance in the name of the law, there was no response from the male spectators present. It was left to three housewives—two of them swinging their handbags and the other a policeman's helmet which she had picked up from the ground—to answer the call.

Thus did the ladies of Watford put their menfolk to shame! We do not like to think that this want of co-operation was due to any worsening of relations between police and public. But rather that it was as a result of the present practice of hooligans to arm themselves with such offensive weapons as bicycle chains, coshes, and the like—and to use them freely when anyone attempts to interfere with their activities.

In a more recent case still, in which there had been a previous argument between two 18-year-old youths in a public-house in Nottingham, one of them subsequently reported to the police: "I was met in the street by four of them. When they came towards me I sensed that there was trouble brewing, and I retreated until my back was to a wall. S. then said to me: 'I hear you were calling on me on Friday night,' meaning that I had asked him to fight. He stood over me and said: 'Have you got a knife?'

"I replied: 'I don't have one.'

"Whilst he had been talking to me he had his right hand in his jacket pocket. He then said: 'Well, I've got one,' and as he spoke he drew a throwing-knife from his pocket and made a scooping movement with the blade. I put my hands to my face and felt it bleeding. I then saw S. and the other three running away."

When a schoolmaster spanked a boy for splashing ink over his coat, the boy produced a flick-knife and ostentatiously started to clean his finger-nails with it. Later he threatened to "put the gang" on the master, who at once hurried off to the police for protection. The surprising thing these days is that the youth's parents did not also summon the master for assault for spanking their offspring!

It is only within the last few years that the use of a flick-knife as a weapon has become so widespread. But this new Act, it is hoped, will do something to cut off the supply, for it prohibits their manufacture and sale in this country. Whatever we think of the necessity or otherwise of such legislation, it is obviously desirable that this weapon, which could be especially dangerous in the hands of an adolescent, should be put out of harm's way. And it is hoped that parents will co-operate to see that all flick-knives are handed in to the police without delay.

Practice and Procedure

Courts-Martial Appeals

The practice to be observed by the Court of Criminal Appeal in dealing with an application to withdraw a notice of abandonment has been laid down in *R.* v. *Moore* (1957) 41 Cr.App.R. 179, *R.* v. *Van Dyn* (1932) 23 Cr.App.R. 150 and *R.* v. *Pitman* (1916) 12 Cr.App.R. 14. The court will not entertain applications for the withdrawal of notices of abandonment unless something amounting to mistake or fraud was alleged which, if established, would enable the court to treat the notice as a nullity.

In the Courts-Martial Appeal Court, the only difference is that there is no corresponding provision to Rule 23 of the Criminal Appeal Rules, 1908 (which provides that when a notice of abandonment is served, the appeal is deemed to have been dismissed). By Rule 5 of the Courts-Martial Appeal Rules, 1952 (S.I. 1952, No. 194), " an appellant may, at any time after he has made application for leave to appeal, abandon his appeal by giving to the registrar notice of abandonment thereof in Form 3." By Rule 8 (3) an appellant who wishes to appeal to the court from the refusal of an application by a single judge must do so within ten days of receiving notice from the registrar of the judge's decision. The Rules make no provision for the withdrawal of a notice of abandonment and it would seem not unreasonable that the court should insist on the same special circumstances as are required for the withdrawal of a notice of abandonment under Rule 23 of the Criminal Appeal Rules, 1908, notwithstanding the absence from the Courts-Martial Rule of any provision by which the appeal is deemed to have been dismissed.

In *R.* v. *Caddy* (Courts-Martial Appeal Court, July 20, 1959) it was held that, although an attempt to reinstate an application for leave to appeal after service of a notice of abandonment had been made within the prescribed period of ten days, there was no ground for differentiating the procedure in that court from the similar procedure in the Court of Criminal Appeal. The application for leave to withdraw the notice of abandonment was refused, as there was no ground even approaching the exceptional circumstances required for the grant of such an application. [H. P.]

Prison Commissioners' Report

Section 21 (4) of the Criminal Justice Act, 1948, requires the court to consider any report made on behalf of the Prison Commissioners on the offender's physical and mental condition and suitability for corrective training or preventive detention before sentencing him to either. Section 20 (8) requires that such a report shall be given to the accused or his counsel or solicitor by the court.

In *R.* v. *Wintle* (Court of Criminal Appeal: June 29, 1959) one of the grounds of appeal was that the appellant had not been shown the Borstal Commissioners' report. In this case the court stated that in many cases it was impossible to tell from the transcript whether the prison commissioners' or the borstal commissioners' report had ever been handed to the prisoner or his counsel. The court thought that the handing of a copy should be a routine matter, and that some oral observation should be made, such as " I now hand you the report," which would appear on the transcript. The proper time for doing this would be after the notices of previous convictions had been proved. That this is the proper procedure was suggested by Lord Goddard C.J. in *R.* v. *Dickson* (1949) 34 Cr.App.R. 9 at p. 13. In that case, Lord Goddard also commented that it was not clear to him " or to any of His Majesty's judges " why it was necessary to serve that report on the prisoner, adding, " In some cases I think it is very undesirable, because it may sometimes give him ideas about his mental condition which he perhaps should not know." With respect, however, it is submitted that it is hardly less important that the prisoner should know the evidence on which his sentence is based than that he should know the facts on which his conviction is based. [H. P.]

Case and Comment *

ACCESSORY

Knowledge of illegal venture—requirement of knowledge of the type of crime committed

R. v. Bainbridge

Court of Criminal Appeal: Lord Parker C.J., Byrne and Winn JJ.: June 8, 1959.[1]

B. was convicted of being accessory before the fact to office-breaking. B. had purchased certain oxygen cutting equipment which had been used in connection with the offence of breaking into a bank. His defence was that, whilst he knew the equipment was to be used for some unlawful purpose, he did not know that the offence which was in fact committed was intended. On the question of the element of knowledge of the principal offence necessary to constitute being an accessory before the fact the jury were directed, *inter alia*: "The knowledge that is required to be proved in the mind of this man is not the knowledge of the precise crime. In other words it need not be proved he knew the Midland Bank, Stoke Newington branch was going to be broken and entered and money stolen from that particular bank, but he must know the type of crime that was in fact committed. In this case it is a breaking and entering of premises and the stealing of property from those premises. It must be proved that he knew that sort of crime was intended and was going to be committed. It is not enough to show that he either suspected or knew that some crime was going to be committed, some crime which might have been a breaking and entering or might have been disposing of stolen property or anything of that kind. That is not enough. It must be proved he knew the type of crime which was in fact committed was intended." On appeal to the Court of Criminal Appeal:

Held, that the direction to the jury could not be criticised. It was not enough merely for the prosecution to prove that the accused knew an illegal venture was intended; but it was not necessary for the prosecution to prove that a particular offence on a particular date at particular premises was intended. There must be knowledge, and not merely suspicion, that an offence of the type in question was intended. The direction in the present case made clear that there must be knowledge of the type of offence in question, namely the offence of breaking and entering and stealing, and that the equipment was bought with an offence of that type in view. Accordingly the appeal would be dismissed.

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* Reported, unless otherwise stated, by David Calcutt and Henry Palmer, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the appellant: *Robin Simpson* (instructed by L. Dawson & Co.). For the Crown: *Mervyn Griffith-Jones* (instructed by the Solicitor, Metropolitan Police).

[H. P.]

Commentary. The problem of how far an alleged accessory before the fact must be proved to have known the details of the crime in question is one which has given rise to some difficulty. *R.* v. *Lomas* (1913) 9 Cr.App.R. 220 was formerly relied on as authority for the proposition that "there must be some particular crime in view." In that case L. had a jemmy belonging to a burglar, K. He returned the jemmy to K. who committed a burglary with it. It was held that L. was not liable as an accessory. In *R.* v. *Bullock* (1954) 38 Cr.App.R. 151, however, the Court of Criminal Appeal held that *Lomas* was no authority for the proposition stated above. The case turned on the fact that it was K.'s own jemmy; as L. was not entitled to withhold it, his doing what he had no right not to do could not make him an accessory. As Devlin J. put it in *National Coal Board* v. *Gamble* (1958) 42 Cr.App.R. at 247, L. although physically performing a positive act, in law was only refraining from detinue. *Bullock* does not greatly help in the solution of the problem since the court upheld the conviction apparently on the ground that B. must have known what the particular unlawful purpose was, but the present case seems to establish the valuable principle that it is enough that the accessory knew the type of crime which was contemplated, even if he did not know the person or thing which was to be the subject of it, or the time, place or other circumstances in which the crime was to be carried out.

CHILDREN

Evidence—corroboration—indecent assault

See R. *v.* Sawyer, below.

EVIDENCE

Indecent assault—corroboration—misdirection to the jury

R. v. Sawyer

Court of Criminal Appeal: Lord Parker C.J., Slade and Winn JJ.: June 29, 1959: *The Times*, June 30, 1959.[2]

S. was convicted at quarter sessions of an indecent assault upon a boy aged nine. A., who was the boy assaulted and another boy, M., had been playing on a golf course when a man came along on a bicycle and, when M. went off to look for something, the man indecently assaulted A. At the trial defending counsel did not dispute that an indecent assault had taken place but only that S. was the man concerned. The jury were directed: " In view of the way this case has gone it is not denied between the parties that an indecent assault was made on the small boy and I do not think it necessary to worry you with the questions of law and corroboration in this charge which one has to deal with in normal cases. The sole question today is whether this man was the man who committed the indecent assault." On appeal to the Court of Criminal Appeal:

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[2] For the appellant: *J. R. Whitley* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *D. H. W. Vowden* (instructed by Messrs. Taylor, Jelf & Co. for Messrs. Wilson & Sons, Salisbury).

Held, that the direction to the jury was wrong. In such a case as this the ordinary warning must be given to a jury of the danger of acting on the uncorroborated evidence of the complainant, particularly in a case of this sort where the complainant was a child who, though sworn, was in fact only nine years of age. It was true that there was evidence capable of amounting to corroboration, namely, the evidence of the other boy, but there ought at least to have been a general warning as to the danger of acting on the uncorroborated evidence of small children. This question had been dealt with in *Campbell's* case (1956) 40 Cr.App.R. at p. 102, and this court accordingly felt that there had been a serious omission in the summing-up. Although there was a number of cases, *R.* v. *Gregg* (1932) 24 Cr.App.R. 13 being perhaps the most striking, where the proviso to section 4 (1) of the Criminal Appeal Act, 1907, had been applied although there had been no direction to the jury as to corroboration of the evidence of children, this court felt that it would be wrong to apply the proviso in the present case. Accordingly the appeal would be allowed. [H. P.]

Commentary. Corroboration of the evidence of the victim of a sexual offence (whatever his age) is always required as a matter of practice The judge should warn the jury of the danger of convicting on such uncorroborated evidence but, if they then do so, the conviction is perfectly lawful.

In *Davies* v. *D.P.P.* [1954] A.C. 378, the House of Lords, dealing with the similar rule of practice requiring corroboration of the evidence of an accomplice, laid it down that where the judge fails to warn the jury in accordance with the rule, the conviction will be quashed even if in fact there is ample corroboration of the evidence of the accomplice, unless the court can apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907. It is thought that a similar rule probably applies in the case of sexual offences though there is some indication that the court regards the requirement of corroboration as less strict in the case of sexual offences than in that of accomplices. Thus in *R.* v. *Crocker* (1922) 17 Cr.App.R. 46, 48, Lord Hewart C.J. said, "This court cannot accept the contention that the evidence of a girl, the victim of the offence, is on the same plane with that of the evidence of an accomplice. The objection in such a case as this is not on the grounds of complicity, but because the case is one of an oath against oath. If, therefore, it is within the province of a jury to convict on the uncorroborated evidence of an accomplice, how much more is it within their province here."

EXTRADITION

Fugitive offenders—evidence of foreign law—expert evidence

R. v. Governor of Brixton Prison, ex p. Shuter

Queen's Bench Divisional Court: Lord Parker C.J., Slade and Davies JJ.: *The Times*, July 8, 1959.[3]

The applicant for a writ of habeas corpus had been committed to prison to await his return to Kenya by a warrant of committal made by the Chief Magistrate, in pursuance of the provisions of Part I of the Fugitive Offenders Act, 1881. The applicant had been brought before the Chief Magistrate upon a warrant of arrest issued by the seni or resident magistrate in Nairobi. Attached to the warrant was a document setting out the offences with which the applicant was charged in Kenya, giving the maximum punishments which could be imposed under the law of Kenya in respect of each offence. In respect of nine out of the eleven offences with which the applicant was charged, this punishment was stated to be imprisonment for a period exceeding twelve months. Part I of the Fugitive Offenders Act applies only to offences which are punishable in the dominion concerned with twelve months' imprisonment with hard labour, or more, or any greater punishment. The document contained no reference to hard labour. There was no other evidence of the law of Kenya before the Chief Magistrate.

Held, dismissing the application, (1) that the evidence before the Chief Magistrate of the law of Kenya in regard to punishment for the offences charged was insufficient, since the document was not admissible under the provisions of the Fugitive Offenders Act relating to evidence, and in any event contained no reference to hard labour: (2) that there was jurisdiction in the court to remit the matter to the Chief Magistrate in order that it might be dealt with in accordance with what should become the settled practice (*infra*) and that in the meantime the applicant might be admitted to bail; (3) that the appellant's contention that the attempt to secure his return to Kenya was not made in good faith in the interests of justice was not made out.

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[3] For the applicant: *Neil Butter* (instructed by the Official Solicitor). For the Government of Kenya: *John Mathew* (instructed by Charles Russell & Co.). For the Governor of Brixton Prison: *J. H. Buzzard* (instructed by the Director of Public Prosecutions).

Per curiam: In these cases there should be a settled practice that evidence of the local law should be given by an expert in that law; this evidence should be given either orally before the magistrate in England or in the form of a deposition attached to the papers sent from the dominion court. It is not safe to attempt to prove the law of the dominion by putting in copies of local Acts and Ordinances before the magistrate, for no one but an expert can be sure that they have not been repealed or amended. [D. C.]

Commentary. The Fugitive Offenders Act, 1881, makes provision for the apprehension and return from one part of Her Majesty's dominions to another of a person who is accused of having committed an offence in the latter part. Section 9 defines the offences to which the Act applies and includes any offence punishable "for the time being" by twelve months or more imprisonment with hard labour. "Hard labour" includes "rigorous imprisonment and any confinement in a prison combined with labour, by whatever name it is called." Hard labour was, of course, abolished in England by the Criminal Justice Act, 1948, and this would seem to have put a very serious limitation on the number of offences for which the return to the United Kingdom of a fugitive therefrom may be required under the authority of the Act. The matter would seem to require reconsideration.

It is a general rule that foreign law should be proved as a fact by expert witnesses. Only English law is judicially noticed by the English courts, so Scots and colonial law is foreign law for this purpose.

HABEAS CORPUS

Application from Northern Rhodesia—protectorate—jurisdiction

Re Mwenya

Queen's Bench Divisional Court: Lord Parker C.J., Slade and Winn JJ.: *The Times*, July 4, 1959.[4]

The applicant for a writ of habeas corpus had been confined to the Mporokoso District of Northern Rhodesia by virtue of certain restriction orders. The ground of the application was that these orders were void because the Orders in Council under which they were made were invalid in that they failed to comply with the Rules Publication Act, 1893. The respondents to the application were the Secretary of State for the Colonies, the Governor of Northern Rhodesia, and the District Commissioner of the Mporokoso District.

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[4] For the applicant: *Neil Lawson, Q.C.*, and *Bryan Anns* (instructed by Potel, Tattersall & Lake). For the Secretary of State: *Sir Reginald Manningham-Buller, Q.C., A.-G.*, and *J. R. Cumming-Bruce* (instructed by the Treasury Solicitor). For the Governor and the District Commissioner: *B. J. M. MacKenna, Q.C.*, and *J. G. Le Quesne* (instructed by Charles Russell & Co.).

Held, dismissing the application, (1) that the writ would not issue into the Protectorate of Northern Rhodesia, which for this purpose was foreign territory, since the right of the Sovereign's subjects to protection by this means was limited to protection in the Sovereign's dominions; (2) that the writ would not issue to the Secretary of State, who had neither actual nor constructive custody of the applicant's body. [D. C.]

Commentary. This case, which raises serious constitutional issues, is now under consideration by the Court of Appeal, who have reserved judgment until the end of the vacation (*The Times*, July 30, 1959). This unusual course has been adopted because of the difficulties and importance of the questions raised. The court was influenced by the fact that the applicant was not confined in a prison cell, but had a considerable area in which to move about and that, although he had been there since 1956, the application was a very recent move.

Extradition—fugitive offenders

See R. *v.* GOVERNOR OF BRIXTON PRISON, *ex p.* SHUTER, p. 656, *ante.*

KENYA

Evidence of local law—fugitive offenders

See R. *v.* GOVERNOR OF BRIXTON PRISON, *ex p.* SHUTER, p. 656, *ante.*

NORTHERN RHODESIA

Application for habeas corpus—jurisdiction

See *Re* MWENYA, p. 657, *ante.*

QUARTER SESSIONS

Committal for sentence—jurisdiction to remit case to magistrates—change of plea

R. v. King

Doncaster Borough Quarter Sessions: A. B. Goss, Esq., Recorder: July 28, 1959.[5]

K. had pleaded guilty before Doncaster Borough Magistrates on July 18th to three charges of larceny from a dwelling-house and one charge of attempted suicide. By reason of his previous character and antecedents the magistrates committed him for sentence to quarter sessions.

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[5] For the prosecution: *Alexander Lyon* (instructed by Prosecuting Solicitor, Doncaster). For the prisoner: *John Graham* (instructed by the court).

Having taken instructions from K., his counsel informed the court that he had advised his client that he ought not to have pleaded guilty to one of the charges of larceny and the charge of attempted suicide. K. had not been represented before the magistrates, and had received no legal advice before he came to quarter sessions. His counsel therefore asked the court to adopt the procedure in *R.* v. *Savage and Torch* [1955] Crim.L.R. 191 and remit the case to Doncaster magistrates for them to decide whether there was a case to permit K. to change his plea.

Counsel for the prosecution objected to this course being taken and cited *R.* v. *Sheridan* [1937] 1 K.B. 223, referring primarily to the passage in the judgment of Humphreys J. (pp. 229–230) in which *R.* v. *Blaby* [1894] 2 Q.B. 170 was discussed and followed. Once K. had pleaded guilty without equivocation, he was convicted and had no remedy before quarter sessions. He submitted that *R.* v. *Savage and Torch* was wrong and inconsistent with *R.* v. *Sheridan*. This was not a case like those where a plea of guilty had been equivocal when quarter sessions would have had jurisdiction to entertain an appeal. He submitted that there was a lacuna in the law and a man who in his ignorance of the law had pleaded guilty to a charge of which he was not guilty in law had no remedy.

Replying, counsel for the prisoner argued that in practice accused persons were frequently permitted to change their pleas in such circumstances. Such a course was frequently necessary in conspiracy cases where one alleged conspirator pleaded guilty and his alleged companion pleaded not guilty and was acquitted. He cited *R.* v. *Plummer* [1902] 2 K.B. 339.

Held, dismissing the application, that in view of the fact that K. had pleaded guilty, the court had no jurisdiction to remit the case to the magistrates.

K. was sentenced to six months' imprisonment.

[JOHN M. COLLINS, *Barrister-at-Law.*]

Commentary. A conviction is complete as soon as it is announced in court by a magistrate, notwithstanding that no entry has been made in the register nor any sentence imposed: *R.* v. *Sheridan* (*supra*); *R.* v. *Manchester Justices, ex p. Lever* [1937] 2 K.B. 96; *R.* v. *Campbell, ex p. Hoy* [1953] 1 Q.B. 585; and *cf. R.* v. *Huntingdon and Leightonstone*

JJ., ex p. Simpkin and Coombes [1959] Crim.L.R. 367. In *R.* v. *Campbell, ex p. Hoy* it was held that, once a magistrate has heard and determined the case and convicted, he is *functus officio* and has no power to allow the plea to be changed. This being so, it is very difficult indeed to see why a court of quarter sessions, to which the convicted prisoner has been sent for sentence, should be able to confer such a power on the magistrate by remitting the case to him; yet that appears to be the effect of *R.* v. *Savage and Torch* (*supra*). It is submitted with respect that that case was wrongly decided and is inconsistent with the authorities cited above, as well as with the present case.

ROAD TRAFFIC

Causing death by dangerous driving—defence of automatism—direction to jury

R. v. Sibbles

Leeds Assizes: Paull J.: July 13, 1959.[6]

S. was charged with causing the death of Mrs. W. by driving his motor-car on Hollins Hill, part of the main Bradford–Otley road, in a dangerous manner. Whilst climbing the hill his car had swerved from side to side of the road, finally colliding with another vehicle in which Mrs. W. was a passenger travelling in the opposite direction.

S., who was aged forty-nine, had had high blood pressure for about ten years, and some years before had suffered from dizzy spells. He had spent the evening at a public-house, and stated that he had had " about five bottles " of beer. On leaving the public-house he had been arrested by the police on a charge of driving a motor-vehicle when under the influence of drink to such an extent as to be incapable of having proper control over it. On his being taken to the police-station, however, the station sergeant refused to accept the charge, and he was permitted to drive away. The accident occurred within twenty minutes thereafter.

S. stated that he had no recollection of the accident: all he could remember was feeling unwell at a point shortly before where the accident occurred and banging his head on the windscreen. A doctor on behalf of the defence said that S.'s actions at the time of, and after, the accident were consistent with his having been in a state of automatism at the time. When a man had high blood pressure this state could be brought on by a comparatively minor blow.

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[6] For the Crown: *J. A. Cotton* (instructed by Town Clerk, Bradford). For the defence: *Rudolph Lyons, Q.C.*, and *D. Wagstaff* (instructed by Willey, Hargrave & Co., Leeds).

It was argued for the defence that a reasonable explanation for S.'s driving was that the emotional disturbance S. had suffered on being arrested had affected his blood pressure and had caused momentary dizziness or a blackout when he had banged his head against the car windscreen, and that this had brought on a state of automatism. (A small bruise had been seen on S.'s forehead after the accident.)

Paull J. directed the jury that they should answer three questions:

(1) Were the movements of the car dangerous?

(2) If their answer to (1) was Yes, was the defendant at the wheel?

(3) If their answer to (2) was Yes, they should convict, unless they found that the defendant suddenly and unexpectedly was deprived of all thought and that deprivation was not connected with any deliberate act or deliberate conduct of his and arose from a cause which a reasonable man would have no reason to think and the defendant did not think might occur. (Applying *Hill* v. *Baxter* [1958] 1 Q.B. 277; [1958] Crim.L.R. 192.)

Paull J. observed that if a man, knowing he was subject to dizzy spells or blackouts, chose to drive a car, it would be no defence to such a charge to say he had had a dizzy spell or a blackout. Similarly, if a man fell asleep when at the wheel, that would be no defence to a charge of dangerous driving: one would say to him: "When you began to get sleepy, you should have stopped the car." It was no answer for a man to say that he had got high blood pressure if, knowing that he had high blood pressure, he deliberately took drink and so caused his blood pressure to rise. In this case the jury might think that the alcohol which the defendant had admitted taking was a contributory cause of any dizzy spell he might have had. The defence of "automatism" was only intended to cover totally unexpected circumstances which deprived the driver of all control over his car, such as a swarm of bees attacking the driver.

S. was convicted of the offence.

[JOHN M. COLLINS, *Barrister-at-Law*.]

Commentary. While the direction in this case is in accord with the statement of the law in *Hill* v. *Baxter* (*supra*) and is, no doubt, a wise ruling from the point of view of policy, it is, on analysis, a little difficult to reconcile with the words of the Act. It would seem that the accused is held guilty because he continues to drive the car when he knew or ought to have known that he might lose control and cause danger to the public. Thus Pearson J., in considering ([1958] 1 Q.B.

286–287) the case of a man who knows he is liable to have an epileptic fit, said that whether he was guilty of reckless or dangerous driving " might depend to some extent on the degree and frequency of the epilepsy and the degree of probability that an epileptic fit might come upon him." He was clearly of the opinion that a man is not driving and therefore not driving dangerously if he is having an epileptic fit, so that " he is unconscious and there are merely spasmodic movements of his arms and legs." This must be equally so whether the fit is foreseeable or not, and therefore it follows that the dangerous driving for which liability is imposed precedes the onset of the fit. Thus, in the present case, if S. was unconscious while his car was swerving from side to side, he was not, according to Pearson J., driving it in a dangerous manner. He was, however, doing this up to the moment when he became unconscious, although it may be that, until then, the car was travelling along the road in a perfectly orthodox manner. If this interpretation is correct, then it would seem that a man who ought to know he is likely to have an epileptic fit is guilty before he has executed any dangerous manoeuvre; yet it is difficult to see that he has, at that point, driven " *in a manner* which is dangerous to the public." This conclusion seems, nevertheless, to follow, not only from the observations in *Hill* v. *Baxter* (*supra*), but also from the decision in *Kay* v. *Butterworth* (1945) 110 J.P. 75 and *Henderson* v. *Jones* [1955] Crim.L.R. 318; *The Times*, March 8, 1955. It is, however, irreconcilable (with great respect to Mr. K. C. Clarke, who advances the contrary view [1959] Crim.L.R. 258) with *Edwards* v. *Clarke* (115 J.P.N. 426), which appeared to require some evidence of the manner of driving prior to falling asleep. Since, however, *Edwards* v. *Clarke* has been declared by the Divisional Court to be " a case depending on its own special facts " which was " never reported and quite rightly so " (*The Times*, *op. cit.*), it is clear that it should not be followed in the future and is best forgotten.

If it is accepted that the man who continues driving when he is feeling sleepy is driving in a dangerous manner, there is no difficulty, in cases like the present, about the further conclusion that death has been caused by the dangerous driving. It is thought that the courts are not likely to worry unduly about these theoretical difficulties and it may be assumed that juries will continue to receive directions similar to that given by Paull J. in the present case.

VERDICT

Inconsistency—receiving a motor-car knowing it to be stolen—larceny of the number plates

R. v. Mills

Court of Criminal Appeal: Byrne, Slade and Salmon JJ.: July 20, 1959.[7]

M. was tried at quarter sessions on an indictment containing four counts, namely, (i) larceny of a motor-car, (ii) taking and driving away the car without the owner's consent, (iii) receiving the car knowing it to have been stolen, and (iv) larceny of two number plates of the car. He was acquitted of the first two offences and convicted of the last two. The original number plates on the motor-car had been taken off and false number plates substituted. On appeal to the Court of Criminal Appeal:

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[7] For the appellant: *D. Wild* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *C. J. Crespi* (instructed by the Solicitor, Metropolitan Police).

Held, that the two verdicts of guilty were really mutually destructive. If M. had, as the jury found (owing perhaps to the deputy-chairman's unfortunate failure to give a sufficient direction with regard to possession), received the motor-car, then plainly he had received it with the substituted plates upon it, and he could not be found to have received the motor-car knowing it to have been stolen and at the same time to have stolen the two original number plates, for the two things stood together. Accordingly, the appeal would be allowed. [H. P.]

Commentary. An inconsistent verdict of this nature necessarily requires the quashing of both convictions, for one of them must be wrong and it is impossible to say which. The present is one of many cases in which it would seem desirable that the Court of Criminal Appeal should have power to order a new trial—a power the lack of which the judges of that court have regretted from the start: *cf. R.* v. *Dyson* (1908) 1 Cr.App.R. 13, 15.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Imprisonment

In R. *v*. SAPSFORD the court (Lord Parker C.J., Slade and Winn JJ.: June 23, 1959) varied a sentence of Borstal training to one of six months' imprisonment. S. had been convicted at a magistrates' court of making a false statement to obtain a certificate of insurance and of stealing a driving licence, and had been sentenced by quarter sessions. S., who was a man of twenty years of age, had (apart from offences as a juvenile) been placed on probation and disqualified in 1956 for taking and driving away a motor-car without the consent of the owner, and again placed on probation in 1957 for driving while uninsured and disqualified (together with five days' imprisonment for breach of probation). Six weeks later he was fined and disqualified for three years for driving while disqualified and making false applications for insurance and driving licence. The court stated that it was difficult to know what to do with this young man. He was a little old for Borstal training and, over the last two years, had been working well. It would be a complete farce to put him on probation again; he had shown complete and utter disregard for it. Again, offences of this sort were not really a matter for Borstal. The proper course, notwithstanding S.'s age, was to substitute a sentence of six months' imprisonment for the sentence of Borstal training.

In R. *v*. McDONAGH the court (Lord Parker C.J., Slade and Winn JJ.: June 29, 1959) varied a sentence of Borstal training to one of imprisonment for eighteen months. M. had pleaded guilty at quarter sessions to housebreaking and larceny. He had a very bad record and his age was doubtful. The court stated that M. had a shocking record both in Ireland and in this country, and his previous conduct had been so bad that it was most unlikely that Borstal training would be of any benefit to him. Further, there was grave doubt as to whether he qualified for Borstal in regard to age. Nobody could find out his exact age; and M. had himself given three separate versions of it. But, whether or not he was under twenty-one, he could be only just under twenty-one. On the whole this court thought that the sentence of Borstal training ought to be set aside and a sentence of imprisonment for eighteen months substituted.

In R. *v*. HEATON the court (Lord Parker C.J., Slade and Winn JJ.: June 29, 1959) approved sentences totalling three years' imprisonment. H. had pleaded guilty at quarter sessions to three counts of stealing, the articles concerned being a key worth 3s. 6d., Cancer Campaign emblems worth 3s. 6d., another key worth 2s. 6d., and to one count of receiving a Church Army collecting tin worth 9s. H., who was a man of thirty-seven years of age, had a large number of previous convictions for larceny and breaking, beginning in 1947 when he was sentenced to nine months' imprisonment. Between 1950 and 1954 he had been dealt with for eighty different offences on five occasions, and there were six subsequent convictions. The court stated that this man was a professional petty thief and had to be put away for a long time. The sentence of three years' imprisonment had not been apportioned by quarter sessions to the various offences but it was the appropriate total period. It would be divided as to one year on count 2 (stealing the emblems), one year on count 4 (receiving) and six months on each of the other larceny charges, and the sentences would, of course, run consecutively.

Borstal training

In R. *v*. TILL the court (Byrne, Slade and Salmon JJ.: July 13, 1959) approved a sentence of Borstal training. T. had pleaded guilty at a magistrates' court to taking and driving away a motor-vehicle and had been sentenced by quarter sessions. T., who was a young man of seventeen years of age, had been placed on probation in 1953 for larceny; sent to an approved school in the same year for larceny; fined and conditionally discharged in 1957 for taking and driving away and other road traffic offences; placed on probation and ordered to attend an attendance centre in the same year for similar offences; sent to a detention centre in 1958 for further similar offences; and convicted of two further similar offences in March 1959. The court stated that T., unless subjected to some form of strict discipline, would continue to commit this class of offence over and over again, and it was high time he was checked. Each case must be decided on its own facts. In the opinion of this court the sentence passed by quarter sessions was the correct one, and the sentence of Borstal training would, therefore, stand.

Probation

In R. *v*. WEAVER the court (Lord Parker C.J., Slade and Winn JJ.: June 22, 1959) varied a sentence of Borstal training to one of probation for three years. W. had pleaded guilty at a magistrates' court to nine offences of obtaining goods by false pretences and to larceny (selling goods obtained under hire-purchase and credit-sale agreements) and had been sentenced by quarter sessions. W., who was a young woman of nineteen years of age, had been fined in 1950 for two similar offences. The court stated that W. came of a good family and the Prison Commissioners had reported that in their view institutional discipline and training would not be in her best interests. In addition, the probation officer had given a fairly favourable report. Apparently W.'s husband was no good and there were no less than eight other persons (largely members of the husband's family) who had been involved in these offences. In the circumstances the sentence of Borstal training would be set aside and there would be a probation order for three years.

In R. *v*. HUET the court (Lord Parker C.J., Slade and Gorman JJ.: July 6, 1959) substituted a probation order for a sentence of two years' imprisonment. The court stated that the sentence of two years' imprisonment was a perfectly proper one. However, the court had been informed that H. was broken in health and would probably never spend any time outside the prison hospital. It was because of his state of health and for no other reason that the court proposed to make a probation order so that he could undergo treatment in hospital. Accordingly, the sentence of two years' imprisonment would be set aside and a probation order for two years substituted. It would be a condition of the probation order that H. should go forthwith to the S. M. Hospital and stay there under the care of Dr. P. and that he should co-operate in regard to any necessary operation.

In R. *v.* WILSON the court (Byrne, Slade and Salmon JJ.: July 20, 1959) varied a sentence of two years' imprisonment to one of probation for three years. W. had been convicted by a magistrates' court of larceny and had been sentenced for that and another offence of larceny by quarter sessions. W., who was a woman of fifty-seven years of age, had ten previous convictions. The court stated that W., a widow, had undoubtedly had a hard struggle in her life. Her husband had died when she was thirty-five years of age and she had worked and brought up her son. She was now very much disabled, having to wear a spinal jacket, and was quite unfit for work. Although she had a bad record, there were long gaps between convictions; she was not in trouble from 1944 to 1949 nor from 1953 to the date of the present offence. Having regard to these matters, this court would give her an opportunity to try to live down her past. In the circumstances the court would substitute a probation order for three years for the sentence of two years' imprisonment.

Acts and Orders*

London Traffic

The following Orders have been made detailing prescribed routes: S.I. Nos. 1142 (Kensington) (2d.); 1143 (Lambeth) (2d.); 1148 (Paddington) (2d.); 1149 (St. Albans) (2d.); 1150 (Westminster) (2d.); 1151 (Deptford) (2d.).

Magistrates' Courts

The local Act superannuation scheme administered by the London County Council is modified and adapted for justices' clerks and their staffs paid by the London County Council. The earlier

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* Prepared by F. Maurice Drake, *Barrister-at-Law.*

Regulations of 1955 (S.I. No. 1495) are replaced with the amendments necessitated by the adoption by the London County Council of a new consolidated superannuation scheme. Provision is made for the reckoning of war service and national service, and the age of retirement of a justices' clerk is made 75 or any lesser age, not being less than 65, at which he completes 45 years' service. The Magistrates' Court Committee may, however, with his consent, extend the service of any person to whom the Regulations apply beyond the age of compulsory retirement if they deem it expedient to do so. In this and other respects the Regulations modify and adapt the new local Act scheme in much the same way as the 1955 Regulations modified and adapted the local Act scheme then in force. Operative July 1, 1959. JUSTICES' CLERKS AND ASSISTANTS (SUPERANNUATION) (LONDON) REGULATIONS, 1959 (S.I. No. 1105) (4d.).

Road Traffic

Provision is made for the regulation of traffic using special roads (described in the Regulations as " motorways ") provided under the Special Roads Act, 1949, or the Highways Act, 1959, in cases where such roads can be used only by traffic of classes I and II specified in the Second Schedule to the Special Roads Act, 1949, or the Fourth Schedule to the Highways Act, 1959, as varied by any orders for the time being having effect which vary the composition of those classes of traffic. The Regulations apply only to roads which are in England or Wales and revoke the Preston By-Pass Motorway Traffic Regulations, 1958 (S.I. No. 1983). The Regulations provide that except in certain specified cases (a) vehicles are to be driven on the carriageways only (reg. 5); (b) one way driving is to be observed by vehicles using carriageways which are contiguous to a central reservation and by vehicles using lengths of carriageway which are not so contiguous in cases where traffic signs are so placed that vehicles can enter those lengths of carriageway at one end only (Reg. 6); (c) vehicles are not to stop on the carriageways (Reg. 7 (1)); (d) vehicles are not to reverse (Reg. 8); (e) vehicles may use the verges only to the extent permitted by Regulation 7 (2) and (3) (which covers such cases as illness, breakdown, stopping to pick up some fallen object or other emergency) (Reg. 9); (f) vehicles are not to be driven or to remain at rest on central reservations (Reg. 10); (g) vehicles are not to be driven on motorways by learner-drivers (Reg. 11); (h) persons on foot on a motorway are not to be on the carriageways or on central reservations (Reg. 12); (i) animals carried in a vehicle are as far as practicable to be kept in the vehicle or, if they are not in the vehicle, are not to go or remain on any part of a motorway other than a verge and are to be kept under proper control (Reg. 13). Regulation 14 provides that certain classes of traffic not ordinarily authorised to use motorways may do so as specified in paragraph (1), *e.g.*, for repair or construction work on the motorway, and makes provision for enabling such traffic to be authorised to use a motorway as specified in paragraphs (2) and (3). There are certain general exceptions from the provisions of the Regulations and the Minister is authorised to relax any prohibition or restriction imposed (Reg. 15). Operative August 1, 1959. Motorways Traffic Regulations, 1959 (S.I. 1147) (5d.).

For penalties for contraventions, see section 12 of the Special Roads Act, 1949.

Section 19 (1) of the Road Traffic Act, 1956, enables the Minister of Transport and Civil Aviation, on the application of the Council of a Borough to which that section has by Order been applied, to designate parking places on highways in that Borough for vehicles and at the same time enables the Council to make charges for vehicles left in such parking places. This Order applies that section to the areas of the County Boroughs of Birmingham, Bristol, Derby, Leeds, Liverpool, Manchester, Nottingham, Salford, Sheffield and Southend-on-Sea. Operative July 11, 1959. Parking Places (Extension outside London No. 1) Order, 1959 (S.I. No. 1178) (2d.).

Scotland

The Public Health (Condensed Milk) (Scotland) Regulations 1931 to 1953 (S.R. & O. 1931, No. 116, and 1943, No. 1061, S.I 1953, No. 1618), are revoked and substantially re-enacted in a consolidated and revised form. Certain new provisions are introduced, the principal ones being (a) to provide for the sale of condensed partly skimmed (half cream) milk labelled " should not be used for babies except under medical advice " (paragraphs 1 (*c*) and (*d*) of the First Schedule); (b) to define half cream milk as meaning milk which contains not less than 10·8 per cent. of milk solids including not less than 1·8 per cent. of milk fat (paragraph 2 of the First Schedule); and (c) to prescribe minimum percentages of milk fat and milk solids including fat for condensed partly skimmed (half cream) milk (Second Schedule). The new Regulations apply in Scotland only, and are operative July 3, 1959 Condensed Milk (Scotland) Regulations, 1959 (S.I. No. 1115 (4d.).

For penalties for contraventions, see Regulation 7 of these Regulations.

The principal Regulations (S.I. No. 413) are amended in two respects: (1) a typographical error in Reg. 31 (3) (*b*) is corrected, and (2) it is made clear that Reg. 32 (3) (*a*) penalises a person who lets premises for use for the purpose of trading in food only if he lets them without first having complied with any structural requirement of the regulations applicable to that purpose. Operative July 9, 1959. FOOD HYGIENE (SCOTLAND) AMENDMENT REGULATIONS, 1959 (S.I. No. 1153) (3d.).

Sea Fisheries

Orders have been made which confirm Regulations made by the White Fish Authority revoking Regulations previously made for the registration (1) of wholesale merchants other than wholesale merchants selling only at first-hand, engaged in the white fish industry (S.I. 1952, No. 747), and (2) of retail merchants and fish friers engaged in the white fish industry (S.I. 1953, No. 1575). Both operative July 1, 1959. WHITE FISH AUTHORITY (REGISTRATION OF WHOLESALE MERCHANTS) (REGISTRATION OF RETAIL MERCHANTS AND FISH FRIERS) (REVOCATION) REGULATIONS CONFIRMATORY ORDERS, 1959 (S.I. Nos. 1109, 1110) (each 3d.).

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 11 *New Fetter Lane, E.C.4." The questions of readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.*

60. *Trailer—engineering plant—living van*

On October 16, 1958, on a public highway a goods lorry was towing a four wheeled trailer, of the caravan type, and used as a living van for men working on road construction. The trailer was ex-R.A.F., being of about 3 tons unladen weight, with hydraulic brakes fitted to all wheels. The brakes operated by cable to the towing lorry. The cable of the trailer was affixed to the cable on the towing lorry by means of a piece of wire, in such a manner that when the brake was applied in the lorry this piece of wire disengaged itself from the trailer cable whereby the brakes upon it were totally ineffective. After inspection by Vehicle Examiners of the Ministry of Transport and proper joining of the two cables the lorry and trailer were allowed to proceed, the lorry drawing off into the distance at something like 20 m.p.h.

The owners and the driver of the trailer were charged with using it on a road when the brakes of the trailer were not maintained in good and efficient working order and properly adjusted, contrary to Regulation 67 of the Motor Vehicles (Construction and Use) Regulations, 1955.

On behalf of the defendants it was argued that the living van trailer was engineering plant within the Motor Vehicles (Authorisation of Special Types) General Order, 1955, and accordingly under Article 15 (m) the trailer only required to be fitted with an efficient brake or suitable scotches to hold the vehicles stationary; it was conceded that there was a separate and effective hand brake on the trailer for such purpose. On behalf of the informant it was argued that the trailer did not come within the definition of engineering plant in Article 13 since one of the criteria there was that the vehicle could not " . . . owing to the requirements of such special purposes, comply in all respects with the requirements of the Construction and Use Regulations. . . ." The informant said that there was no reason why the trailer should not have complied with the Construction and Use Regulations—indeed, proper and operable brakes were fitted—and this the defendants agreed.

It was also pointed out to the magistrates that under Regulation 76 of the Construction and Use Regulations the wording was " . . . every part of every braking system and the means of operation thereof *fitted* to a motor-vehicle or trailer . . ." and not "*required by law to be fitted*."

The magistrates convicted and fined both defendants. Incidentally, in Article 13 (c) living vans are specifically mentioned, which would seem to indicate that they are not within the term engineering plant. [M. R.]

ANSWER

I agree that a trailer used as living accommodation for men working on road construction does not come within the meaning of the term "engineering plant" so as to qualify for the less stringent provisions as to brakes as set out under Regulation 15 (m) of the Motor Vehicles (Authorisation of Special Types) General Order, 1955 (S.I. 1955, No. 1038, as amended).

The definition of "engineering plant" is given in Regulation 13 of that Order as "movable plant or equipment being a motor-vehicle or trailer (not constructed primarily to carry a load) specially designed and constucted for the special purposes of engineering operations. . . ." I do not think that this vehicle was specially constructed for the special purpose of engineering operations merely because it was living accommodation specially suited to the needs of men engaged in engineering operations. If this were so a well-designed luxury caravan modified to sleep engineering men would so qualify; and I do not think the Order extends this far.

Furthermore, I agree that on the evidence actually before the court this particular trailer *could* comply with the requirements of the Construction and Use Regulations.

Prosecutions for similar offences are not uncommon, but I have no knowledge of a case on all fours or directly comparable with the facts stated above. [M. D.]

Letters to the Editor

Offences under Sections 11 and 12 of the Road Traffic Act, 1930

Sir,

I see on p. 494 of your current issue that your contributor Mr. K. C. Clarke says "There is no . . . principle of good driving to the effect that the driver of a vehicle must be able to pull up within the limits of his vision."

But on p. 6 of the Highway Code, para. 18, says "Never drive at such a speed that you cannot pull up well within the distance you can see to be clear." (Highway Code 1954 ed., price 1d.)

Mr. Clarke supports his view by quoting *Morris* v. *Luton Corporation* (a civil case). What the court may have said in that case surely is not binding in a criminal case.

Yours faithfully,
ERIC CREWDSON.

Westmorland.

[Mr. Clarke writes: *Morris* v. *Luton Corporation* [1946] 1 K.B. 114 was a case where a cyclist, riding along at night during the hours of blackout, had collided with an air-raid shelter erected by the Corporation. The shelter was not lighted, but the corners were painted white, and the cyclist, who suffered injuries, sued the Corporation. One of the questions which the Court of Appeal had to consider was whether the trial judge had been justified in holding that the cyclist was not guilty of contributory negligence. In ruling that there was ample evidence to support the finding of the trial judge in this respect, Lord Greene M.R. said ". . . counsel for the Corporation argued that that finding violated what he first described as a principle of law, and afterwards, alternatively, suggested was something in the nature of a principle of good driving. I refer to the well-known passage in the judgment of Scrutton L.J. in *Baker* v. *Longhurst & Sons, Ltd.* [1933] 2 K.B. 461, 467, where he appears to lay down some sort of general proposition that a person driving a vehicle or riding in the dark must be able to pull up within the limits of his vision. That observation has turned out to be very unfortunate, because these questions, as has been so often pointed out, are ones of fact. There is a temptation for a judge dealing with a traffic case to decide questions of fact in language which appears to lay down some rule which road users must observe. . . . It is, however, much to be deprecated because these questions of fact are dependent on the circumstances of each case. I cannot regard that observation of Scrutton L.J. as in any sense affecting other cases where the circumstances are different. I hope that this suggested principle may now rest peacefully in the grave and not be resurrected." MacKinnon and Tucker L.JJ. concurred with the observations of Lord Greene.

My correspondent suggests that what the court may have said in this case is not binding in a criminal case, but my contention is that, if magistrates are considering whether a defendant drove carelessly, they should give full weight to any decisions of the higher civil courts on matters of motor negligence, because the standard of care expected of a driver is the same in civil as in criminal law. Indeed, the *Luton* case is mentioned in *Stone* (91st ed.) on p. 2075, in a footnote to section 12 of the Road Traffic Act, 1930.

However, I agree that the effect of the decision in the *Luton* case appears to conflict with rule 18 of the Highway Code, but I suggest that the matter may be explained in the following way:

(1) The courts will not lay down as an absolute rule to be observed by all road users that the driver of a vehicle must be able, in any circumstances, to pull up within the limits of his vision. They are reluctant to do so because it is possible to envisage circumstances where a driver has been unable to pull up within the limits of his vision, but where it would be proper to argue that he has nonetheless exercised all the care that could be expected from a reasonable and prudent driver, *e.g.*, on facts similar to those in the *Luton* case, or the case of a man who drives round a sharp bend on an unlighted country lane at night and collides with a tree trunk which has fallen across the road.

(2) Whilst rule 18 of the Highway Code in effect provides that a driver should always be able to pull up within the limits of his vision, and whilst section 45 (4) of the 1930 Act says that failure to observe any provision in the Code may be relied upon by any party as tending to establish or negative liability in any criminal or civil proceedings, we should not lose sight of the fact that the Highway Code is not binding as a statutory regulation and that its real purpose is to give information and advice to drivers, the effect of section 45 (4) being to render such information and advice as is contained in the Code admissible in evidence. It would be a poor prosecutor who did not recognise the fact that failure on the part of a motorist to obey one or more of the provisions in the Code might *not* be sufficient to establish that he was driving carelessly. See *Gibbons* v. *Kahl* [1956] 1 Q.B. 59. In this case a defendant was in breach of several of the rules contained in the Highway Code, but the High Court refused to upset the finding of the magistrates that the defendant was not guilty of careless driving.

(3) Thus, when prosecuting a case of careless driving before the magistrates, one may properly rely upon the contention that the incident complained of was due to the defendant being unable to pull up within the limits of his vision and, if the evidence supports this view, there is no doubt that in the majority of cases a conviction will follow. However, each case must depend upon its own special facts

and one must recognise that no absolute rule can be laid down and that there are some cases where a conviction for careless driving would not be justified, even though it could be shown that the defendant had failed to pull up within the limits of his vision.]

The Preparation of Important Documents

Sir,

Apropos of Dr. Wilson R. Harrison's article in your June issue, it is interesting to compare the Scots practice with the English, from the point of view of the degree of security afforded.

Sealing is not requisite or usual, except for a limited company, so that the method illustrated of securing several sheets together with a magnificent seal and ribbon is never encountered. What guards against the insertion of a false sheet is the requirement that each sheet be signed, and in practice every page is signed. A person who is unable to write because of illness or for any other reason may have his deed executed notarially by a solicitor, or the minister of the parish.

Conveyances are registered in the General Register of Sasines for publication as soon as they have been delivered, a photostat copy being retained in the Register. Deeds, generally, are registered in the Books of Council and Session (the books of the Supreme Court) for preservation and, where appropriate, for execution. The deed itself is retained in the Register, a photostat copy being issued. The Register is open to public inspection so that it is not suitable for deeds of a confidential nature and a will is not normally registered until after the testator's death.

I do not know whether it is due to Scots thrift, but it has never been the practice to "scrap" a page merely because it contains an erasure or alteration. Every deed has at the end a testing clause which states the date and place of signing and the particulars of the witnesses. (Two witnesses are necessary to a signature in Scotland.) It also declares any erasures or interlineations and if the grantor's signature differs from his full name, this is narrated with mention of the signature.

Dr. Harrison leaves no doubt as to the undesirability of using ball-point pens, although he does not go so far as to say that the ink will fade in every case. A solicitor friend of mine had an apt reply for any client who might question his advice against using a ball-point pen. He would say, with dignity, "It hasn't been in existence long enough for us to tell whether it will last."

Yours faithfully,

IAIN M. S. DONNELL.

Kowloon, Hong Kong.

R. v. Powell-Mantle—Admissibility: Questioning About Offences Other Than Those With Which Prisoner is Charged

Sir,

I have read with interest the commentary on the case of *R.* v. *Powell-Mantle* reported at pp. 445 and 446 of your June issue but find it more than difficult to accept your commentator's conclusions.

Unfortunately the report of the case does not disclose whether or not Powell-Mantle was cautioned by the police before he was questioned for the second time at Dunstable. If he was not then Rule 3 of the Judges' Rules was breached and there could in consequence be little doubt as to the inadmissibility of the relative evidence; but even if he was duly cautioned I suggest this case is no authority for the proposition that a person in custody should not be questioned, even after caution, in respect of other crimes, since the ground on which the learned Chairman excluded the evidence of the second interview appears to be that the matters the subject thereof were so clearly linked to those for which Powell-Mantle was arrested as not to be properly describable as such.

With regard to the assertion that the questioning of a prisoner about a crime for which he is not in custody receives a more severe condemnation than does questioning him about the charge on which he has been arrested, I have been unable to find any authority for this proposition other than recommendation xlvii of the Royal Commission and paragraph 159 of their report (to both of which you have referred), but, as you have pointed out, neither has the force of law and one can only suppose that the Commission's view in this connection did not commend itself to those responsible for changing the existing law.

As to Wigmore's view, surely this is no more than an aphorism which is applicable to all forms of police interrogation whether or not the person being questioned is in custody?

Turning to the case of *R.* v. *Booker* (1924) 18 Cr.App.R. 47, as it has not been disapproved by a court of equal or higher standing surely it must represent the law? Moreover I would suggest that the fact that it gives the words of Rule 3 of the Judges' Rules their plain common-sense meaning confers added (although unnecessary) authority; but be this as it may, *Booker's* case is undoubtedly supported by the case of *R.* v. *Calvert* (unfortunately unreported) heard in the Courts-Martial Appeal Court on May 11, 1953, and *R.* v. *Smith* [1959] 2 W.L.R. 623; 43 Cr.App.R. 121; [1959] 2 All E.R. 193.

In the former case the Courts-Martial Appeal Court had before it as a material part of the evidence against the appellant a statement made by him under caution when he was in custody following arrest for alleged acts of indecency. The statement was concerned with further alleged acts of indecency which were brought to the notice of the police after the appellant's arrest. However, the admissibility of the statement was not challenged at trial or on appeal, nor did the Courts-Martial Appeal Court comment adversely thereon although the circumstances in which it was made were fully before them.

The appeal in *Smith's* case turned on the admissibility of an alleged oral admission and written statement made after caution by Private Smith to a member of the Special Investigation Branch of the Corps of Royal Military Police in the course of a murder investigation.

At the time that Pte. Smith made the admission and statement he was in custody (close arrest) for stabbing with a bayonet the person with whose murder he was subsequently charged, having made a previous admission of responsibility to his Regimental Sergeant Major. The admissibility of the oral admission and written statement made to the Special Investigation Branch was challenged on the grounds that a threat by the Regimental Sergeant Major which resulted in the accused's first oral admission was still operating on his mind when he was later interviewed by the Special Investigation Branch. It was not, however, suggested either at trial or on appeal that, as the accused was already in custody in connection with the matter about which he was questioned by the Special Investigation Branch, he should not have been so questioned even after caution. Moreover on appeal it was held that although the first admission was not a voluntary confession and should not have been admitted, the oral admission and written statement made to the Special Investigation Branch were properly admitted by the trial court.

Having regard to the above I suggest it is difficult to resist the conclusion that Rule 3 of the Judges' Rules means precisely what it says and that the questioning of persons already in custody is permissible provided a caution is first administered; furthermore that if there has been any modification of this view (as suggested by § 1119 of Archbold) it certainly does not apply when the person in custody is being questioned about other crimes.

In conclusion might I suggest that your commentator in putting forward his "better view" has fallen into the error of taking as his basic premise a statement, *viz.*, the "now repudiated view, etc.," which would appear to be untenable.

Yours faithfully,

A. H. K. CAMPBELL,

Colonel.

D.A.L.S., War Office, Stanmore, Middlesex.

Sir,

With reference to the commentary given to the above case ([1959] Crim.L.R. 445–448), I must admit that I read the submission in the last paragraph with some trepidation.

Whilst accepting the fact that a person in custody should not be questioned regarding the crime for which he is in custody, I consider that this was never intended to be applied to other crimes. If this was the case not only would it act to the detriment of the prisoner but to the community as a whole.

I have in mind the travelling criminal suspected or wanted for crimes committed throughout the country, who is arrested for housebreaking, say in Birmingham. If your submission is correct this would mean that he could not be questioned respecting the other offences he has or may have committed until such time as he is released from custody. The result would be that he would not be given the opportunity of having all the offences he has committed considered by the court when he is dealt with, either because he has failed to remember and tell the arresting police officer all about them or because he has refrained deliberately from mentioning them in the hope that no one would connect him with these particular offences. To charge him subsequently with them would make a further drain on public funds and would be contrary to current practice.

Another example is the person arrested for, say, taking and driving away a motor-vehicle without the owner's consent. In his possession is found a cheque book reported stolen from another part of the country. Cheques have been used from this book since it was stolen, and offences of false pretences are revealed. Again, if the submission is correct, no questions could be put to the prisoner to ascertain how the book came to be in his possession, because it would amount to questioning him regarding other crimes.

Such questioning might lead to the recovery of stolen property or even further arrests. Equally this applies to the crime for which the person is in custody. Whether or not the answers given would be admitted in evidence is an entirely different matter.

I can only think that a great many police officers have travelled long distances and have "cleared up" a tremendous number of undetected crimes simply by visiting persons in custody in police stations or in prisons and questioning them in the manner frowned upon by your commentator. Quite often such questioning has resulted in further charges being preferred or even the person being produced on a Home Office Order at a different court.

Yours faithfully,

IVAN D. PACKMAN,

Inspector, Kent County Constabulary.

Canterbury, Kent.

Sir,

With reference to the commentary on pages 446 and 447 in the *Criminal Law Review* of June 1959 I should like to submit the following observations on the Judges' Rules for your comments:

The Judges' Rules are administrative rules and were formulated for the purpose of explaining to police officers the conditions under which courts would be likely to admit in evidence statements made by persons suspected or charged with crime. Surely, therefore, the rules only apply to material required to go in as evidence, and this point should be made clear?

In my view it is ludicrous to suggest that the police have no right to question a prisoner or person in custody about any crime or offence with which he is or may be charged. Police officers must question prisoners, but must conform to the rules if they want the material they obtain to be admitted in evidence. They would be failing in their duty in the "prevention and detection of crime" if they did not ask a prisoner about other offences he may have committed. If this rule was followed, the police should not visit men in H.M. prisons to question them about other offences.

I should be very grateful, therefore, for your observations on these points, and, in particular, whether you consider a man in prison should be cautioned before the interviewing officer asks him any questions about other offences. In my own opinion the prisoner in this case is in the category of rule 1, and should not be cautioned until he comes in the category of rule 2 when it has been decided to charge him. Rule 3 I consider refers only "to being in custody for the charge for which he was arrested," particularly as H.M. judges have since advised that this rule was never intended to encourage or authorise the questioning or cross-examination of a person in custody after he has been cautioned, *on the subject of the crime for which he is in custody.*

I shall look forward to your comments.

Yours faithfully,

G. C. PAYNE,

Detective Sergeant, Lincolnshire Constabulary.

Louth, Lincolnshire.

[Professor J. C. Smith writes: Of the many points raised by the three correspondents, it is convenient to deal first with Colonel Campbell's view that "Rule 3 of the Judges' Rules means precisely what it says and that the questioning of persons already in custody is permissible provided a caution is first administered." With respect, it is clear that this is not so. The Home Office Circular, being issued with the approval of the judges, has the same degree of authority as the Rules themselves, and makes it quite clear that questioning of a prisoner on the subject of the crime for which he is in custody is not approved. The problem of questioning about other crimes is considered below.

The case of *R.* v. *Calvert*, as described by Colonel Campbell, has no bearing on the problem. There is no suggestion that the confession was obtained from the prisoner by questioning him while in custody, and it is quite clear that a statement is not inadmissible merely because it is made by a prisoner after a caution has been administered. If it were otherwise the words of the caution would be untrue, for the prisoner is told that what he says "may be given in evidence." It is hardly surprising, then, that the admissibility of the statement was not challenged. The explanation of *R.* v. *Smith* seems to be the same; the only question which appears to have been asked by the sergeant of the Special Investigation Branch was whether Smith wished to make a statement.

With reference to Detective Sergeant Payne's letter, it is true that the origin of the Judges' Rules is to be found in the difficulties experienced by the police through inconsistent rulings of the courts as to the admissibility of statements and, particularly, as to the propriety of cautioning accused persons. The Rules themselves, however, are in no sense rules of evidence and the only reference to admissibility in them is Rule 6 which provides that a statement is not rendered inadmissible because it was made before there was time to caution the prisoner.

The status of the rules was described by the Court of Criminal Appeal in *R.* v. *Voisin* (1918) 13 Cr.App.R. 89: "These Rules have not the force of law, they are administrative directions, the observance of which the Police authorities should enforce on their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from prisoners contrary to the spirit of these Rules may be rejected as evidence by the judge presiding at the trial."

The *object* of the Rules is fairness in the administration of justice and, rightly or wrongly, it is considered unfair for the police to question a person in their custody at least about the offence with which he is charged. The *sanction* behind the Rules is the possibility that a statement obtained in contravention of them will be excluded.

The statement in paragraph 2 of Detective Sergeant Payne's letter (with respect) puts the cart before the horse. The taking of a statement in contravention of the Judges' Rules is not wrong because the statement may be excluded in evidence. Rather, the statement is excluded because the taking of it is wrong—not "wrong" in that any law is contravened but only in the sense that there has been a departure from the practice which has been approved "as tending to the fair administration of justice."

The difficulties of applying a rule which prohibits only those questions designed to obtain answers which could be used in evidence are considered below.

As regards persons in prison, the Home Office Circular stated that Rule 3 applies equally to "prisoners in the custody of a gaoler." (See Halsbury, Vol. 10, p. 471.) It is presumed that this refers only to persons awaiting trial for an offence and not to convicted prisoners. As regards persons awaiting trial questioning about offences other than that for which they are detained would seem, then, to be governed by the same considerations (below) whether they are in police custody or in prison.

It is thought that a convicted prisoner is probably not "in custody" within the Rules. The heading of the Rules as circulated by the Home Office (according to Cmd. 3279, p. 70) states that they apply to "Prisoners in *Police* Custody" (my italics). In *R.* v. *Straffen* [1952] 2 Q.B. 911 Cassels J., at the trial, took the view that the words "in custody" in the Rules meant "in custody of the police" and, therefore, that a Broadmoor patient is not in custody for this purpose. The Court of Criminal Appeal did not dissent from this view. Cassels J. pointed out that if the Rules applied to a Broadmoor patient it would never be possible to question him without first administering the caution. It is thought that the same considerations should apply to a convicted person in prison. The position would seem to be that such a person can be questioned about an offence under Rule 1 until the police officer has made up his mind to charge him with that offence. He should then be cautioned. The position thereafter is not clear. If the view advanced here is correct, the prisoner is still not in custody within the Rules and therefore, neither they nor the Home Office Circular, in terms, preclude further questioning. Since, however, the prisoner would presumably be arrested at this point if he were not already in prison, it is submitted that further interrogation would be contrary to the spirit of the Rules, if not to the letter.

Cases similar to those referred to by Inspector Packman were put to the Royal Commission on Police Powers and Procedure (1928–29) by police witnesses and by the Director of Public Prosecutions (Minutes of Evidence, Questions 1169, 3229, 1175 and 4633) but were considered by the Commission to be insufficient to justify the questioning of a person in custody (Report, paras. 166–169).

On the issue of questioning prisoners about outstanding charges, the Commission's Report declared: "This procedure, however, is specifically, and in our view rightly, discountenanced by the Home Office Consolidated Circular to the Police (January 1, 1925), which instructs them to give this preliminary notice [of outstanding charges] to the prisoner and expressly adds that it is not intended that he should be asked any questions about it."

Of the example of stolen property being found on a man under arrest on a totally different charge, the Commission's view was: "In that case outside evidence to prove a charge of theft against him is either available or not; if it is not, the only useful effect of questioning the man can be to obtain answers which are incriminatory."

Inspector Packman's suggestion that it may be in the prisoner's own interest that he should be questioned was also put to the Commission and received by them with some scepticism. Surely the prisoner's interests would be sufficiently safeguarded if he were handed a written notice of the possibility (and the advantages) of asking for other offences to be taken into consideration in the event of his being convicted. It is again emphasised that the Commission's views are of no authority whatever but are advanced merely to suggest what the Home Office Circular, following quickly upon the Commission's Report, probably intended. On the other hand, it is certainly arguable (as Colonel Campbell suggests) that the Commission's view did not commend itself to the judges and that the express reference in the circular to " the crime for which he is in custody " was intended to exclude other crimes from the prohibition. It is clearly impossible to assert that the practice described by Inspector Packman is wrong; but if it is right then so—it would seem—is the practice of arresting on a minor charge in order to question about a major one; which is surely quite contrary to the spirit, if not the letter, of the Rules. Would it not also mean that the prisoner could be questioned about offences, other than for which he is in custody, but which would be admissible in evidence under the " similar facts " rule on the trial of that offence? This is what happened in *R.* v. *Straffen* but, as the accused was not " in custody " the point was not raised. Or is the interrogating policeman expected to distinguish between those offences which are so admissible and those which are not?—a question which is hardly less obscure after three attempts by the House of Lords to clarify it than formerly.

It is submitted that it is high time that the Rules were revised and clarified. It is most unsatisfactory that they should have to be read with an explanatory circular and Rules 2 and 3 are grossly misleading unless they are so read. It is also desirable that there should be an express ruling on the subject of " other offences."]

Books and Periodicals

Commander Burt of Scotland Yard. By Himself. London: Heinemann. 1958. 18s. 246 pp.

If every soldier can be said to have a Field Marshal's baton in his kitbag, surely it may now be said that every Metropolitan C.I.D. officer has a publisher's contract for his memoirs in his briefcase.

It is a pity that these memoirs are not always written with the clarity and lucidity which must have undoubtedly distinguished these officers' reports when they were serving in the force.

Whatever other failings Mr. Burt's book may have, it is worth reading for his final paragraphs—his "Epilogue" as he calls it. This salty, commonsense approach to crime and punishment is so refreshing in this era of pale pink probation and pity the poor prisoner; when no one ever considers the victim, even when he is exposed to the lash of defending counsel's tongue!

HUGH DUDLEY.

Readers' digest:

Probation: Higher appointments in the probation service: 123 *Justice of the Peace* 409.

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THE
CRIMINAL LAW
REVIEW

October 1959

The Lord Chief Justice

Strong criticisms of the Homicide Act, 1957, and of the Street Offences Act, 1959, have been voiced by Lord Parker C.J. whilst visiting Canada to attend the annual convention of the Canadian Bar Association.

The Lord Chief Justice, who earlier had been quoted as favouring corporal punishment, emphasised that the views he was expressing were his own private views: "I did not, and do not, speak for the judiciary."

He described the position under the 1957 Homicide Act as "ridiculous." If a man kills and robs, he hangs, but if he kills and doesn't rob he doesn't hang. This provides an unfair advantage for the man who intended to rob but found no money on his victim.

If a man shoots a woman under English law he hangs, but if he stabs her he doesn't. If he kills a policeman in any manner he hangs. If he poisons—a cold-blooded crime—he doesn't hang. And, of course, if he kills twice he hangs, even if he has been given a life sentence for his first murder.

The whole thing, he said, was a political compromise and a bad one. He would prefer to see the death sentence abolished entirely rather than permit this sort of confusion.

Of the Street Offences Act, the Lord Chief Justice said that he was not sure that the new look of London's streets was all it seemed to be. This legislation was the sort of thing that drives the evil underground, resulting in organised prostitution on a large scale and what was known as the "call girl" system. He also suggested that the new law might put great temptations in the way of the policeman on the beat to accept bribes.

We think that these comments, coming as they do from the Lord Chief Justice, albeit in his private capacity, accurately reflect the opinion of many lawyers and laymen in this country. The Homicide Act, particularly, has been the subject of criticism in many quarters on the ground that it was enacted as a political compromise. Political compromises over such matters of law do not add to the repute of the law. The Act has now been in force for two and a half years and there have been a sufficient number of cases for a review of the working of the Act to be of value. We shall publish such a review shortly.

The Street Offences Act, 1959, has been in operation for only a few weeks and its full effect cannot yet be seen. We intend, however, to publish a report on the working of this Act in the New Year.

Indecency with children

The Criminal Law Revision Committee, set up in February "to examine such aspects of the criminal law of England and Wales as the Home Secretary may from time to time refer to the Committee, to consider whether the law requires revision, and to make recommendations," has now published its first report.[1]

The Committee had been asked to consider what alterations should be made to the law to provide for the punishment of a person who, without committing an assault, invites a child to handle him indecently or otherwise behaves indecently towards a child. The reference was occasioned by a gap in the law which had been revealed by such cases as *Fairclough* v. *Whipp*,[2] *D. P. P.* v. *Rogers*[3] and *Williams* v. *Gibbs*.[4]

The Committee did not feel it right to recommend a solution to the problem by providing in the widest terms that any kind of indecency in relation to children should be a crime. The reasons given for this decision were, first, that not all morally harmful or reprehensible conduct ought necessarily to be covered by the criminal law; secondly, that such a provision would be difficult to administer, because it would tend to receive different interpretations in different courts; thirdly, it would be out of keeping with, and might cause doubt and confusion in, the other provisions of the law as to sexual offences.

The principal provision of the draft Bill prepared by the Committee reads therefore:

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[1] Cmnd. 835.

[2] [1951] 2 All E.R. 834.

[3] [1953] 1 W.L.R. 1017.

[4] [1958] Crim.C. & C. 138.

> "Any person who commits an act of gross indecency with or towards a child under the age of fourteen, or who incites a child under that age to such an act with him or another, shall be liable on conviction on indictment to imprisonment for a term not exceeding two years, or on summary conviction to imprisonment for a term not exceeding six months, to a fine not exceeding one hundred pounds, or to both."

The offence would apply to conduct by persons of either sex who have reached the age of criminal responsibility.

It is to be hoped that the recommendations of the Committee will be acted upon at the earliest possible opportunity.

British Academy of Forensic Science

At a meeting convened by Dr. F. E. Camps, Reader in Forensic Medicine at the University of London, it was decided to establish a British Academy of Forensic Science, whose object will be "to advance the forensic sciences in all their aspects to the benefit of justice and the law."

The academy, which will provide a meeting ground for members of the legal profession, police and forensic science specialists, will hold an annual meeting at which symposia will be held to enable the interchange of ideas between the different branches of forensic science. The first meeting will be held next year in London. It is also intended that a journal of the Academy shall be published.

Floating "borstals"

The White Paper "Penal Practice in A Changing Society" published by the Home Office last February drew attention, among other things, to the problem of young offenders sent to prison for short periods where the conditions make it impossible to organise a form of training which is both corrective and exacting. The Prison Commissioners are faced with a building programme of formidable dimensions so far as the building of detention centres and training establishments is concerned.

Mr. W. A. Young, a London business man, has proposed a solution to this problem which has received the approval of several headmasters and others concerned with the spread of juvenile crime, notably Sir Patrick Spens, who has undertaken to try to find other supporters of the scheme.

The proposed scheme is to refit ships, which are now laid up "to provide a period of training up to six months predominantly at sea for a number of selected young male offenders who are judged as likely to be cured and educated by it."

The ships would be ocean-going vessels commanded by retired naval officers. There are said to be twenty or more suitable ships available and the estimated cost of providing "ocean-going borstals" supplementary to the present borstal system would not be excessively greater than that of providing orthodox borstals and could be achieved more quickly.

The idea behind the scheme seems to us to be a sound one. Basically the principle is the same as that of a detention centre —a "short, sharp shock" produced by rigid discipline. But this scheme has further advantages because the discipline would appear to have more object than that of a detention centre. It would be vitally necessary to the running of the ship and, under ocean-going conditions, the necessity for it would probably appear obvious to the youths subjected to it. They would also have the opportunity of learning a trade which, to be of value, must be other than a purely maritime trade.

United Nations Congress

The Second United Nations Congress on the Prevention of Crime and the Treatment of Offenders will be held at Church House and Carlton House, London, from August 8 to August 20, 1960. The Government of the United Kingdom will act as host.

Persons interested in attending the Congress should apply for registration cards to the Chief of the Section of Social Defence, United Nations Headquarters, New York. Applications should be made not later than February 29, 1960. There is no registration fee.

Judicial appointment

John Henry Lancelot Aubrey-Fletcher, Esq., has been appointed a Metropolitan Magistrate.

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R. v. *Algar*

The facts of the case of *R.* v. *Algar*[1] will be familiar to all who read the article entitled "Monroe *v.* Twistleton Today" which was contributed to the April issue of this *Review* by Dr. Rupert Cross.[2] Algar went through a ceremony of marriage in 1934. In 1950 his wife obtained a decree of nullity on the grounds of his impotence. In 1953 he was charged with forging her signature on a number of cheques in 1947 and 1948. The defence was that he had her implied authority to sign cheques in her name. His former wife was called to prove that she had neither signed nor authorised him to sign the cheques and he was convicted.

Before the Court of Criminal Appeal counsel for the Crown conceded, on the authority of *Monroe* v. *Twistleton*[3] (a civil case decided in 1802), that, if the marriage had been dissolved and not annulled, Mrs. Algar would have been incompetent to give evidence for the prosecution about matters which occurred during the marriage and, inevitably, the conviction was quashed.[4] "The concession," wrote Dr. Cross in his article, "that *Monroe* v. *Twistleton* still applies to criminal proceedings came as a surprise to some lawyers because the point was not stressed in the current textbooks, but a moment's reflection shows that the concession was one that had to be made."[5] As this article will show, further reflection, based on a study of the relevant statutes and authorities, leads to a very different conclusion.

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[1] [1954] 1 Q.B. 279.

[2] [1959] Crim.L.R. 262.

[3] Peake Add.Cas. 219.

[4] The Crown argued that, as the marriage had been annulled, Mrs. Algar never had been the accused's wife and was, therefore, competent to give evidence against him. The only thing to be said in favour of this argument is that it was supported by the terms of the decree awarded to her in the proceedings for nullity; there can, it is suggested, be no possible doubt that the Court of Criminal Appeal was right to reject it.

[5] The reference to the textbooks current when *R.* v. *Algar* was heard is something of an understatement. There is no reference of any kind to the point in the editions then current of Halsbury's *Laws of England*, Stephen's *Digest of the Law of Evidence*, Phipson on *Evidence*, Taylor on *Evidence*, Archbold's *Criminal Pleading, Evidence and Practice*, Stone's *Justices' Manual* or even Kenny's *Outlines of the Criminal Law*. The only reference to it in any practitioner's textbook then current appears to be on p. 137 of the 16th edition of Roscoe's *Criminal Evidence*, which sets out the rule in the form in which it was approved by the Court of Criminal Appeal in *R.* v. *Algar*. No authority is cited for the proposition (very properly, for there was no authority for it), and it is supported only by a wholly misconceived reference to section 1 (*d*) of the Criminal Evidence Act, 1898.

Reasons for the concession

The reasons given by the Court of Criminal Appeal for approving the Crown's concession ran as follows. At common law a woman could not, after her marriage had been terminated by divorce, give evidence against her husband about any matters which occurred during the marriage: *Monroe* v. *Twistleton*; the decision in that case has been "approved again and again"; the decision, and the decisions approving it, "were cited without criticism or dissent by the Court of Appeal as recently as *Shenton* v. *Tyler*"[6] in 1939; "the three statutes passed in the middle of the last century to reform the law of evidence affected only civil proceedings"; and the decision in *Monroe* v. *Twistleton* accordingly applies to all offences not affected by anything in the thirty odd statutes (including the Criminal Evidence Act, 1898), which were passed between 1872 and 1946 to reform the law of evidence in criminal proceedings.[7]

There is a fatal defect in every stage of this argument: *Monroe* v. *Twistleton*, being a civil case, decided nothing about the admissibility of evidence in criminal proceedings; so far from being approved "again and again," it was considered once, followed once and approved once, on each occasion in a civil case which neither applied nor could apply to criminal proceedings; neither the correctness of any of these decisions nor their applicability to criminal proceedings was in issue in *Shenton* v. *Tyler*, which was another civil case; the first of the three statutes passed in the middle of the nineteenth century to reform the law of evidence applied expressly to criminal proceedings; and the rule in *Monroe* v. *Twistleton* cannot, without producing the most anomalous results, be reconciled with the statutes, and particularly the Criminal Evidence Act, 1898, subsequently passed to reform the law governing the competency of the husbands and wives of accused persons.[8] In fact, those Acts were quite clearly passed on the assumption that the rule in *Monroe* v. *Twistleton* did not apply to criminal proceedings; and it is the object of this article to show that the assumption was well founded. For, as will be seen, the rule never applied to criminal proceedings; and it was in any event abrogated by an enactment which applied to civil and criminal proceedings alike. First of all, however, it is necessary to return to the common law as it stood immediately before the case was decided in 1802.

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[6] [1939] Ch. 620.

[7] [1954] 1 Q.B. 279, at 286–287. The statutes affecting the law in criminal cases that were passed before the Criminal Evidence Act, 1898, are set out in pp. 2272–2275 of Vol. II of the 7th edition of Russell on *Crime*. For subsequent enactments, see Halsbury's *Statutes* (2nd edition), Vol. 9, pp. 617–619. Section 39 of the Sexual Offences Act, 1956, is a purely consolidating enactment.

[8] This passage in the judgment contains three other errors, but they are not material to the argument. See notes 22, 30 and 49, below.

At that time many classes of persons were treated by the common law as disqualified either by crime or by interest from giving evidence,[9] but for the purposes of this article it is necessary to refer only to the parties to the proceedings and their spouses. In civil proceedings neither the plaintiff nor the defendant was competent to give evidence[10]; and their wives were incompetent to give evidence either for or against them.[11] In criminal proceedings the accused was incompetent[12]; and his wife could not give evidence either for or against him, unless he were charged with an offence against her person[13] or liberty[14] and in that event she was a compellable witness for the prosecution and a competent witness for the defence.[15]

These rules of the common law applied only to the parties to valid marriages, so that a bigamous wife,[16] for example, or a wife within the prohibited degrees of consanguinity[17] could properly give evidence for or against her "husband" in either civil or criminal proceedings. The application of the rules to a divorced wife fell to be considered for the first, and the last, time in *Monroe* v. *Twistleton*, in which Lord Alvanley held (in the words of the headnote) that "when man and wife are divorced by Act of Parliament, the wife is not competent to prove a contract made by her husband prior to the divorce." He cited no authority for this conclusion, which he based on the proposition that "it never shall be endured that the confidence which the law has created while the parties remained in the most intimate of all relations shall be broken whenever, by the misconduct of one party (for misconduct alone can have that effect), the relation has been dissolved." For this principle there is no historical justification and it cannot be seriously supposed that the rules governing the competency of husband and wife were in any way based on the need to preserve matrimonial confidences.[18] For the present, however, it is necessary to observe only that the rule in *Monroe* v. *Twistleton* must be taken to have applied with equal force whether the evidence of the divorced wife was given for or against her husband [19]; and that the decision is a decision in a civil case and accordingly, however persuasive it may be, not an authority binding any criminal court.

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[9] See, for example, Phipson on *Evidence* (9th edition), pp. 469–471, and Holdsworth's *History of English Law*, Vol. IX, pp. 193–197.

[10] *Dymoke's Case* (1582) Savile 34, pl. 81.

[11] Co.Litt. 6b. For the sake of convenience, this article will refer generally only to the competency of wives to give evidence for or against their husbands; it will be appreciated that precisely the same rules applied, and apply, to the competency of husbands to give evidence for or against their wives.

[12] Stephen's *History of the Criminal Law*, Vol. 1, pp. 439–442.

[13] *R.* v. *Azire* (1725) 1 Stra. 633.

[14] *R.* v. *Wakefield* (1827) Murray, at 257.

[15] *R.* v. *Perry* (1794), unreported, cited by Abbott C.J. in *R.* v. *Sergeant*, Ry. & M. 354. A wife was not incompetent to give evidence for the prosecution where her husband was the prosecutor, on the grounds that the prosecution was in the name of the Crown.

[16] *Wells* v. *Fisher* (1831) 1 Moo. & R. 99.

[17] *R.* v. *Young* (1851) 5 Cox C.C. 296.

History of Monroe v. Twistleton

Monroe v. *Twistleton* is referred to in the judgment of the Court of Criminal Appeal in *R.* v. *Algar* as "a case approved again and again." In fact its history as an authority is short enough to be set out in full in this article. First, there was a reference to it in the course of the argument in the case of *Aveson* v. *Lord Kinnaird* in 1805, where Lord Ellenborough is reported as saying "that goes on the ground, that the confidence which subsisted between them at the time, shall not be violated in consequence of any future separation." [20] Next, in *Doker* v. *Hasler* in 1824,[21] Best C.J., relying on his slightly faulty recollection of the case (in which he had appeared as counsel), followed it and held that a widow could not, in proceedings instituted by her husband's executrix, give evidence of a conversation with him during the course of the marriage. Finally, both *Monroe* v. *Twistleton* and *Doker* v. *Hasler* were approved by the Court of Common Pleas in 1842 in *O'Connor* v. *Marjoribanks*,[22] the facts of which were in all material respects indistinguishable from the facts of *Doker* v. *Hasler*. These three decisions were all in civil cases and they neither applied nor purported to apply to criminal proceedings; and since in each case one of the parties to the marriage was dead when the proceedings were instituted, they can be of no possible assistance in deciding whether after the dissolution of a marriage the parties to it remain disqualified from giving evidence against one another in criminal proceedings.[23]

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[18] *Shenton* v. *Tyler* [1939] Ch. 620, at 634–635; *Stapleton* v. *Crofts* (1852) 18 Q.B. 367, at 374.

[19] For the disqualification of husbands and wives while the marriage subsisted was absolute; and it is implicit in the judgments in *O'Connor* v. *Marjoribanks* (*infra*, note 22), in which the decision in *Monroe* v. *Twistleton* was approved, that the divorced wife could not give evidence for her husband.

[20] 6 East. 187, 192–193. That case was an action by a man on a policy of insurance on the life of his wife and the decision in *Monroe* v. *Twistleton* was considered in relation to the admissibility of evidence of statements made by her about the state of her health.

[21] Ry. & M. 198.

[22] 4 Man. & G. 435. In an infelicitously expressed sentence, the Court of Criminal Appeal referred to *O'Connor* v. *Marjoribanks* as a case "where the incompetence was extended to a widow's personal representatives"—which can only mean that the incompetency of husband and wife in proceedings to which either of them is a party survives in some way after both of them are dead. It is not necessary to say that no court has ever held this to be the law.

There is, therefore, no significance in the fact that the decisions in *Monroe* v. *Twistleton*, *Doker* v. *Hasler* and *O'Connor* v. *Marjoribanks* were "cited without criticism or dissent by the Court of Appeal as recently as *Shenton* v. *Tyler*." [24] In any event the three cases fell to be considered by the Court of Appeal only because they had for many years been cited in a number of textbooks as authority for the proposition that both a divorced woman and a widow are entitled to refuse to answer questions about communications made to them by their husbands during marriage.[25] The Court of Appeal had no difficulty in pointing out that the three decisions did not support that proposition and that there was, consequently, no authority for it: they related only to the admissibility of the evidence of the divorced wife or widow in proceedings to which she or her former husband or his personal representative was a party; and, since they decided that husband and wife were incompetent to give any evidence in such proceedings at all, there was no room for a rule of privilege.[26] The court having decided that the three cases went to the competency of witnesses and not to their privilege, it became unnecessary to consider whether or not they were rightly decided; and it goes without saying that no question arose, or could in those proceedings have arisen, of their applicability to criminal cases.

Effect of the Evidence Acts

The three decisions had, of course, ceased to be law long before they were considered by the Court of Appeal in 1939, for the whole of the common law relating to the competency of witnesses in civil cases was reformed by three statutes passed in the middle of the nineteenth century. First, the Evidence Act, 1843, removed every disqualification on the grounds of crime or interest, except the disqualification of the parties and their spouses, "on the trial of any issue joined, or of any matter of question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having, by law or by consent of parties, authority to hear, receive, and examine evidence." Next, the Evidence Act, 1851, made the parties to civil proceedings competent and compellable to give evidence. Finally, the Evidence Amendment Act, 1853, provided that the husbands and wives of the parties should be competent and compellable to give evidence on behalf of either or any of the parties.[27] As has been seen, the relevant provision of the 1843 Act applied expressly to criminal proceedings. The 1851 Act provided that nothing in it should make the accused, or the spouse of the accused, competent or compellable to give evidence in criminal proceedings.[28] The 1853 Act provided that nothing in it should render the husband or wife of an accused person either competent or compellable to give evidence in criminal proceedings,[29] but contained also the provision, subsequently re-enacted in almost identical terms in section 1 (*d*) of the Criminal Evidence Act, 1898, but in any event applicable to civil and criminal proceedings alike, that neither party to a marriage should be compellable to disclose any communication made to him or her by the other.

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[23] A fact which appears to have been altogether overlooked by the Court of Criminal Appeal in *R.* v. *Algar*.

[24] [1954] 1 Q.B. 279, at 286.

[25] [1939] Ch. 620, at 639–641 and 650–652.

[26] There is no authority at all about the privilege of husband and wife in proceedings to which neither of them is a party: *Shenton* v. *Tyler* [1939] Ch. 620, at 635.

The question which of these three Acts abrogated the rule in *Monroe* v. *Twistleton* and *O'Connor* v. *Marjoribanks* has never arisen for decision,[30] but there cannot, it is suggested, be very much doubt that it was the Evidence Act, 1843, that finally disposed of the rule. There is nothing in the 1851 Act which touches on it; and the 1853 Act can be interpreted as abrogating it only if in section 1 [31] the word "husbands" is construed as including both widowers and divorced husbands and the word "wives" is construed as including both widows and divorced wives. There is no rule of construction which enables one to read the words as bearing those meanings [32]; and the statute would read very oddly indeed if they did: for in section 2 (which preserves the incompetency of husbands and wives in criminal proceedings) they obviously cannot include widowers and widows; and in section 3 (which enacts the rule of privilege mentioned at the end of the preceding paragraph) they do not include widowers or widows or divorced persons.[33] Moreover, the disqualification of husband and wife (and presumably, therefore, the disqualification of the divorced husband and wife, and the widower and widow) was based on " interest " and it is this incapacity which, subject only to the exceptions specifically mentioned in it,[34] is in terms removed by the Act of 1843; finally, the express exclusion from the ambit of that Act of the parties to proceedings and their spouses suggests very strongly that no other incapacity, and particularly no incapacity of ex-husbands and ex-wives, survived its enactment.

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[27] Section 1, which was enacted as a result of the decision in *Stapleton* v. *Crofts* (1852) 18 Q.B. 367, that section 2 of the Evidence Act, 1851, did not make the husbands and wives of parties competent witnesses in civil cases.

[28] Section 3.

[29] Section 2.

[30] There is nothing in the Report in [1939] Ch. 620 to support the statement in the judgment of the Court of Criminal Appeal in *R.* v. *Algar* that "this was much discussed in *Shenton* v. *Tyler*."

[31] Which made the husbands and wives of parties competent and compellable witnesses.

[32] *Shenton* v. *Tyler* [1939] Ch. 620.

On any view, however, the rule had gone by 1853 without ever, so far as can be ascertained, having been applied in a criminal case.[35] This is not very surprising. The civil rule was not confined to divorced persons, but applied also to widowers and widows, to whom of course an analogous rule in criminal cases could have no possible application; and it was not until the enactment four years later of the Matrimonial Causes Act, 1857, that it became possible to obtain a divorce by any means other than an Act of Parliament. Statutory divorces were so rare—only 184 were obtained in the period 1715–1852[36]—and granted only after compliance with such stringent conditions[37] that there can have been no reasonable possibility of there arising in criminal proceedings any question of a divorced wife giving evidence against her former husband. It was therefore only to be expected that, when, in 1872, Parliament began to alter the law relating to the competency of husbands and wives in criminal cases, it legislated on the assumption that the rule in *Monroe* v. *Twistleton* had no application to them.

That Parliament legislated on that assumption from the enactment of the Licensing Act, 1872, to the enactment of the National Insurance Act, 1946, is, indeed, clear beyond any sort of doubt. In that period Parliament enacted some thirty provisions providing that a husband or wife should be competent, but (with one exception[38]) not compellable, to give evidence for either the prosecution or the defence without making any provision for the case of the divorced husband or wife. There is, as has been seen, no rule enabling one to read the references to husbands and wives in these enactments as including references to divorced husbands and wives;

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[33] *Shenton* v. *Tyler* [1939] Ch. 620.

[34] *i.e.*, the parties and their spouses.

[35] Indeed, it appears from the judgment of the Court of Criminal Appeal that it was in *R.* v. *Algar* that the question arose for the first time.

[36] Rayden on *Divorce* (7th edition), p. 6.

[37] *Ibid.*

[38] Married Women's Property Act, 1884.

indeed, in the case of at least three of them, the Married Women's Property Act, 1884,[39] the Criminal Justice Administration Act, 1914[40] (which relates to bigamy), and the National Insurance Act, 1946[41] (which deals with the husband's obligation to maintain his wife), they obviously cannot be read in this sense. It is, however, quite inconceivable that, while making the wife competent to give evidence during the marriage, Parliament would deliberately have left unchanged a rule that debarred her from giving evidence after the marriage had been dissolved. This applies with particular force to the provision in section 1 of the Criminal Evidence Act, 1898, which makes the wife a competent witness for the defence in all cases and the conclusion is irresistible that Parliament has on every occasion legislated on the assumption that the rule in *Monroe* v. *Twistleton* had at the time no application to the criminal law.[42]

The decision in R. v. Algar

The position when *R.* v. *Algar* came before the Court of Criminal Appeal in 1953 was, therefore, that the rule in *Monroe* v. *Twistleton* had never been applied in a criminal case; that it had been abrogated in the civil law by the Evidence Act, 1843, which also applied to criminal cases; and that for some eighty years Parliament had legislated consistently on the assumption that it had no application to the criminal law. One would, therefore, have expected Algar's appeal to be dismissed on the straightforward ground that a divorced wife was not then, and never had been, incompetent to give evidence against her former husband. It is accordingly necessary at this stage to ask on what grounds the Court of Criminal Appeal came in that case to the conclusions first, that the rule ever applied to criminal cases; second, that it was not affected by the Evidence Act, 1843; and third, that it was either unaffected by, or consistent with, the enactments, and particularly the Criminal Evidence Act, 1898, which after 1872 amended the law relating to the competency of husbands and wives in criminal cases.

The answer to the first of these questions is that the Court of

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[39] Section 1, which makes husbands and wives competent and compellable witnesses in the case of offences against the Married Women's Property Act, 1882.

[40] Section 28 (3).

[41] Section 53 (5).

[42] The fact that Parliament legislates on a certain view of the law is not, of course, conclusive evidence of the state of the law; the interpretation of the law is a matter for the courts and Parliament can make mistakes. There cannot, however, be many cases where the courts have taken a view of the law inconsistent with so many enactments over so long a period.

Criminal Appeal cited no authority for the proposition that the rule ever applied to criminal cases, but contented itself with the observation that "*Monroe* v. *Twistleton*, a case approved again and again, lays down in terms that a divorced wife cannot be called to testify against her husband in respect of any matters arising or conversations which had passed during the marriage"[43]; the answer to the second question is that the court dismissed the Evidence Act, 1843, with the observation, made on three occasions in the course of two paragraphs, that it was one of three statutes which had no application to criminal cases[44]; and the answer to the third question is that the court simply ignored the difficulty involved in reconciling its decision with the provisions of the Acts passed between 1872 and 1946 to deal with the competency of husbands and wives as witnesses in criminal proceedings.[45]

Plainly, the court's judgment cannot be supported. There is no authority for the proposition that the rule in *Monroe* v. *Twistleton* ever applied to criminal cases[46]; and, on the other hand, the Evidence Act, 1843, applies expressly to them. It is not, therefore, surprising that anomalous results follow when the attempt is made, as it must be made, to reconcile the court's decision with the statutory provisions enacted between 1872 and 1946.

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[43] The appellant's counsel is reported as having cited the 1st edition of Roscoe's *Criminal Evidence* as authority for the proposition that the rule applied in criminal cases: [1954] 1 Q.B. 279, at 280. The reference, however, merely completes the circle, for Roscoe's proposition is itself expressed to be based on *Monroe* v. *Twistleton*.

[44] It will have been observed that the Evidence Amendment Act, 1853, also applied to criminal proceedings, but nothing turned on the point in *R.* v. *Algar*. The appellant's counsel is reported as having dismissed the Evidence Act, 1843, on the grounds that it did not affect the position of husband and wife: [1954] 1 Q.B. 279, at 281, to which the answer is quite simply that the decision in *Monroe* v. *Twistleton* also did not affect the position of husband and wife. The appellant argued that the rule in *Monroe* v. *Twistleton* was abrogated by section 1 of the Evidence Amendment Act, 1853, and he based his argument upon the proposition that "at common law the words 'husband' and 'wife' included 'ex-husband' and 'ex-wife,'" a submission for which, not very surprisingly, he appears to have been able to find no authority. It is in fact contradicted by such authority as there is.

[45] This difficulty is also ignored by the appellant's argument as reported. There is nothing in the report to indicate the reasons why the Crown felt obliged to concede the point.

[46] The law relating to the incompetency of husbands and wives in criminal cases differs, both in its origin and in its extent, from the law relating to their incompetency in civil cases; there can, therefore, be no presumption that a decision in one branch of the law will, or ought to, apply equally to the other branch. It may well be that, if the question that arose in *Monroe* v. *Twistleton* had arisen in a criminal case before 1843, the same answer would have been given to it; the point is, however, that the question did not arise—and case law consists of the decisions made by the courts, not the decisions they might have made.

This is a problem of some complexity. On the one hand, the references in those provisions to husbands and wives cannot be construed as including references to divorced husbands and wives and it would appear to follow in every case that, although a wife may, if she wishes, give evidence against her husband, she cannot testify against him, whether she wants to or not, if the trial takes place after the marriage is dissolved[47]; moreover, it would also appear to follow that, although since the Criminal Evidence Act, 1898, a wife can always give evidence for the defence, a divorced wife can never do so.[48] On the other hand, if the Acts are construed as altering the common law rule (so that a divorced wife would always be competent to give evidence for the defence), it would appear to follow that a divorced wife when called as a witness for the prosecution would enjoy a strange privilege in relation to the questions put to her: for she would be compellable to answer questions about matters occurring before and after her marriage, but competent (and not compellable) to answer questions about matters occurring during it.

The choice between these two alternatives is a difficult one. The first does less violence to the language of the statutes; the second is slightly less repugnant to common sense: and since it is also the more conducive to the proper administration of the criminal law, without in any way impairing marital unity, it is, perhaps, to be preferred.

Principles behind the modern rules

It remains only to consider whether the decision in *R.* v. *Algar* accords with the principles on which the modern rules governing the competency of witnesses are based. The court's judgment cites Tindal C.J. and Maule J. as saying in *O'Connor* v. *Marjoribanks* what Lord Alvanley said in *Monroe* v. *Twistleton* itself, namely, that the reason for the rule is " the necessity of preserving the confidence of the conjugal relation." [49] It may be doubted whether the common law rule was based on any such principle: for the common law debarred husband and wife from giving any evidence at all if either of them was a party to the proceedings, but placed no restrictions on the evidence they could be compelled to give if they were not[50]—so that in the one case the rule kept out much that was not confidential while in the other it compelled them to disclose even that which was confidential, and in each case without considering whether the witnesses themselves were willing to disclose it.

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[47] About, that is to say, anything occurring during the marriage.

[48] This consequence is accepted by Dr. Cross in his article: [1959] Crim. L.R. 262, at 267. Apart from the obvious inconvenience of such a rule, however, its acceptance would seem to imply that the rule in *Monroe* v. *Twistleton* still applies with its original force to civil proceedings, for there is in this respect no material difference between the Evidence Amendment Act, 1853, and the Criminal Evidence Act, 1898. This conclusion is rejected, it is thought rightly, by Dr. Cross.

[49] The court's judgment continued " in *O'Connor's* case Maule J. said: 'a rule may be a very good rule, though the reason on which it is founded may not be applicable to every case which is governed by the rule.' As Lord Sumner once observed in *Jones* v. *Jones*: 'principles are like that.' " Lord Sumner's aphorism was in fact directed to a very different proposition; and a principle which is formulated with sufficient care is in

The truth of the matter is, it is suggested, that the common law rules relating to the competency of husband and wife were bad rules and that, as Greene M.R. pointed out in *Shenton* v. *Tyler*, the conflicting reasons which the judges have subsequently given for them from time to time are thoroughly unsatisfactory[51]; decisions founded on them are not, therefore, likely to make good law. Since at least 1898, however, the law has recognised two intelligible principles in this field; the first is that a balance must be struck between the public interest in the administration of the law and the public interest in conjugal felicity, so that a wife will be compellable, competent or incompetent to give evidence against her husband according to the nature of the offence with which he is charged; the second is that the public interest in conjugal felicity requires that a wife should, whether she or her husband are parties to the proceedings or not, be entitled to refuse to answer questions about communications made to her by her husband.[52] Neither of these rules has any application once the marriage has ended[53]; and neither of them, therefore, can be cited in justification of the decision in *R.* v. *Algar*.

Sufficient reasons have now been given, it is suggested, for thinking that that decision was bad in law, inconsistent with principle and anomalous in its application at least to those offences where a wife is a competent but not a compellable witness for the prosecution. That is not to say, of course, that a case for amending legislation has been established. The decision is in practice probably of only limited application and a provision revoking it is not, therefore, likely to find its way easily into a Government Bill, even

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any event not "like that" at all. It is a little difficult to see how a rule prohibiting a widow from giving evidence about something which occurred during her marriage can seriously be thought to be required by "the necessity of preserving the confidence of the conjugal relation."

[50] *Shenton* v. *Tyler* [1939] Ch. 620, at 635.

[51] *Shenton* v. *Tyler* [1939] Ch. 620, at 626.

[52] Evidence Amendment Act, 1853, s. 3.

[53] The first, because it is of its own nature inapplicable once the marriage has ended; the second, because of the decision in *Shenton* v. *Tyler*.

during a session in which we may expect some amendments of the law relating to criminal procedure.[54] Moreover, simple abrogation of the rule can reasonably be criticised on the grounds that it might place a dangerous weapon in the hands of the ill-disposed spouse who contemplates divorce. There is, however, on any view a case for consideration and the issues might, it is suggested, appropriately be referred to the Criminal Law Revision Committee recently appointed by the Home Secretary.[55] If the conclusion is reached that the public interest requires some limitation to be imposed on the right of divorced persons to give evidence in criminal cases, a solution producing less anomalous results than the decision in *R.* v. *Algar* might, perhaps, be found in a provision that a divorced wife should be compellable, competent or incompetent to give evidence against her former husband in respect of offences committed before the dissolution of the marriage according to whether she would have been compellable, competent or incompetent if proceedings had been instituted against him while the marriage subsisted.[56]

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[54] Parl.Deb. H.C., Vol. 610, col. 669, July 30, 1959, when the Home Secretary announced the Government's intention to introduce legislation enabling an appeal to be brought to the House of Lords from a Divisional Court in criminal matters and amending section 1 (6) of the Criminal Appeal Act, 1907.

[55] The terms of reference of the Committee (which were first published in the White Paper "Penal Practice in a Changing Society," Cmnd. 645) and its membership will be found on pp. 517 and 518 respectively of the March issue of this *Review*.

[56] By analogy with *Phillips* v. *Barnett* (1876) 1 Q.B.D. 436, in which it was held that a divorced wife cannot sue her husband for an assault committed during marriage, because (among other reasons) she could not have brought proceedings against him while the marriage subsisted. It will be appreciated that the application of the rule in *R.* v. *Algar* depends, not on the date on which the offence was committed, but on the date of the events to which the witness is asked to testify, so that (to take an improbable example) if Algar had been charged with forging his wife's signature after the annulment of their marriage, she could have given evidence that she did not herself sign them, but she could not have given evidence that she had not during the marriage authorised him to sign on her behalf.

Provocation in Trials for Murder

By C. C. MARSACK

It may well be, as Mr. Eddy says in his article on this subject in the *Criminal Law Review* for December, 1958, that the passing of the Homicide Act, 1957, in England will have eliminated many of the differences of opinion which previously existed on the subject of the common law defence of provocation. Section 3 of that Act, however, perpetuates the existence of that imaginary figure the reasonable man; and as long as the test to be applied is that of the conduct of the reasonable man there will almost inevitably be differences of opinion, and apparently inconsistent judgments where previous leading cases are distinguished on the facts and the distinctions are so finely drawn as to be invisible to almost everyone except the learned judges who draw them. It is not only in the highest legal circles that difficulties are found in the definition of the reasonable man. The whimsicalities of A. P. Herbert and Henry Cecil would convince many a lawyer as well as the average layman that the term is extremely difficult of comprehensive definition.

The matter is one of considerable moment in the Territory of Western Samoa, and practising lawyers here and there in the British Commonwealth may find it worth-while to devote a passing thought to the problems which arise in that country under the present management. Some years ago murder trials were extremely frequent. Since the hanging of Fa'ase'e Fa'agase in 1953—the only person to be hanged for murder in Western Samoa for many years—the number has fallen off considerably; thus furnishing substantial support, at least in the South Pacific, for the views on capital punishment enunciated by the former Lord Chief Justice Lord Goddard. Even so, trials for murder occur often enough to make any aspect of the law relating to culpable homicide a matter of some importance.

The position in Western Samoa

The criminal law applicable to Western Samoa, in so far as the more serious crimes are concerned, is contained in a code set out in a New Zealand statute, the Samoa Act, 1921. This statute was passed after New Zealand had been granted a mandate for Western Samoa by the League of Nations, and, subject to amendments which have been passed from time to time, is still in force. It is based on the New Zealand system of jurisprudence which has its origin in the British. There is no statutory provision regarding the defence of provocation, and the practice in the High Court is to apply the principles of the old common law, with such modifications as are thought appropriate to meet local conditions. These principles have been the subject of judicial pronouncement in the High Court from time to time, and it may well be that the court has adopted a somewhat more flexible interpretation than appears in the English decided cases. The broader interpretation given has always been in favour of the accused, and has resulted in a larger proportion of manslaughter verdicts in murder trials than almost certainly would be the case in England. The extent to which authoritative English decisions are binding upon the High Court of Western Samoa has not yet been conclusively determined; but when the principles of English common law are invoked, as they may be when there is no statutory provision applicable, the judgments of the House of Lords must obviously be treated with the deepest respect.

The question of provocation in murder trials in this country is one of the greatest importance. There are practically no murders arising from gangster warfare or family feuds or the commission of other crimes or sexual aberrations or sheer bad temper, or just for no explicable reason at all. In almost every case the murder has been in some way provoked, and the issue of manslaughter on the ground of provocation must be put to the assessors who are the local equivalent of a jury. It is in this connection that the "reasonable man" presents his difficulties, and those difficulties are not made any easier of solution here by the leading English decisions on the subject. It is the practice of the High Court to take judicial notice of the fact that the Samoan is slower to anger than the impulsive Latin or even the theoretically phlegmatic Anglo-Saxon. It is also accepted that just as his anger takes considerably longer to come to the boil than in the case of a European, so the cooling-down process is very much slower again. Evidence has been given by accused persons on many occasions, and believed by the court, on these lines:

> "The night before I kill this man I cannot sleep because I think how cruel this man has been to my sister two weeks ago. Then I go to sleep but I do not sleep very long. Then I wake up about the time of the second cock-crow (between 2 and 3 in the morning) and I find I am very angry for thinking of my sister. Then soon I am so angry that I cannot hold back

> my anger and I think the Devil has come into me. So I take my bush knife and I go to the *fale* (Samoan house) of the man who has been so cruel to my sister and I kill the man with my knife."

No physician or psychiatrist or psychologist or even a person of standing with a good knowledge of Samoan character has ever been called as a witness to testify that the slow-burning anger reaching a long-delayed climax is part of the normal character of the Samoan. None the less the fact is recognised, and it is the practice of the trial judge to direct the assessors on the cooling-down aspect of the law of provocation in terms of which this might be taken to be a brief but accurate summary:

> " In British courts emphasis has always been upon the principle that the crime cannot be reduced from murder to manslaughter unless the accused acted within so short a time after receiving the provocation that his temper did not have time to cool; that is to say, before he had had time to regain his self-control. In the case of Samoans it is customary for the judge to invite the assessors to interpret this rule somewhat more leniently than in the case of Europeans. It is, I think, well understood that whereas Europeans are quick to anger and quick to cool down, the Samoan temperament is more likely to cause a Samoan to brood for some time over his wrongs or fancied wrongs and to reach the point of loss of control later in time than in the case of a European. You are entitled to take this into consideration in determining whether or not a reasonable Samoan would have had time after the provocation to recover his self-control by the time the act was committed."

It is not suggested for a moment that the accused person whose statement is quoted above would be entitled to a verdict of manslaughter on the ground of provocation. It is quoted only to give an indication of the well-recognised Samoan characteristic of delayed-action anger.

The question now arises: Is the trial judge in Western Samoa entitled to relax, in favour of the accused, the rules regarding the common law defence of provocation which have been laid down by the House of Lords? The decision in *Bedder* v. *D.P.P.*[1] presents a number of difficulties, even if, in respect of crimes committed in Western Samoa, it is possible to substitute the phrase " reasonable Samoan " for the " ordinary reasonable man " referred to in that case. Can it be said that the habit of long brooding followed by a greatly delayed explosion of anger, which is a common but by no means universal Samoan attribute, is an ordinary characteristic of the reasonable Samoan? In *Mancini's*[2] case the court held that what was sufficient to provoke an unusually excitable or pugnacious person, but not that great stand-by of British jurisprudence, the ordinary reasonable man, would not suffice to provide the accused with a good defence of provocation. It cannot be affirmed that a reasonable Samoan—if there is such a person in reality as a reasonable Samoan—is likely to murder a fellow who has seriously annoyed him two or three weeks before. But such occurrences are of sufficient frequency in this small country to make lawyers and laymen alike realise that it would not be quite fair to apply the rules as to provocation that have been laid down by the British courts upon a detailed consideration of the character of the Englishman.

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[1] (1954) 38 Cr.App.R. 133.

Physical abnormality

One of the most ominous features of the judgment in *Bedder's* case, considered at this distance, is that the accused person raising the defence of provocation must have not only the mental attributes of the reasonable man—in so far as the mental attributes of an imaginary person who has probably never existed can be accurately ascertained—but his physical attributes as well. The Law Lords concur that no distinction can fairly be drawn between physical and mental abnormalities. The Lord Chancellor says:

> "It would be plainly illogical not to recognise an unusually excitable or pugnacious temperament in the accused as a matter to be taken into account but yet to recognise for that purpose some unusual physical characteristic, be it impotence or another."

It is felt in parts at least of the South Pacific that a logical distinction can be drawn, and this notwithstanding the fact that modern medicine seems to show that all mental quirks and idiosyncrasies have a physical origin, in the over-development or under-development of some gland or other component part of the human body. To take an example from an actual case. The Samoan is very proud of his normal physical attributes, and ashamed if any of these are below standard. A boy was born with a withered right leg. His lameness was a source of great distress to him, particularly as his fellows did not hesitate to tease and torment him on the subject of his disability. This teasing reached its highest pitch on one occasion when a girl with whom he had fallen in love laughed at him as he made his proposal, and her relatives pursued the matter by ridiculing him to such an extent that he lost control of his temper and killed one of his tormentors by a sudden blow with the bush knife that the Samoan almost always carries with him. It seems clear that the humiliating remarks of the persons concerned would have had no effect whatever on a man with two sound legs, except perhaps to cause him some slight temporary annoyance. In the case of a lame Samoan, however, one who had been made extremely sensitive by the consciousness over the years that he was not as other men are, the taunting might well tax him beyond the limit of endurance. Surely he then should in fairness be entitled to have the jury take his lameness into account in deciding whether or not his defence of provocation had any validity. The Law Lords in *Bedder's* case say that his physical disability should be ignored entirely. The reasonable man in their opinion is not lame. In applying the appropriate test as to the question of provocation it was held improper notionally to invest the hypothetically reasonable man with the physical peculiarities of the accused. Here in the Islands it is felt that the principle might be given a more flexible interpretation so as to permit the jury to give consideration to the fact that the accused was suffering, through no fault of his own, from a severe physical disability, and to take the effect of that disability into account in deciding whether or not the provocation was sufficient to negative the legal conception of malice.

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[2] [1942] A.C. 1.

It is felt that a logical distinction can be drawn between mental divergence from the normal, and physical disability, in so far as it might be brought into account in raising the defence of provocation. The person who by temperament is unusually excitable or pugnacious, or one who is temporarily made excitable or pugnacious by self-induced intoxication, has largely himself to blame in the matter. If he is unusually pugnacious then this fact must be well known to him and he should be able to learn to control his pugnacity by a form of mental discipline. If he is pugnacious through indulgence in alcohol then, to use the phrase of the journalist, he is asking for trouble. When, however, a man is suffering from a severe physical disability for which he cannot be held responsible, and has the certain knowledge that that disability is to remain with him for the rest of his life, is it not equitable to allow him a little more latitude in the matter of provocation on that account? It might possibly be said that it is only the mental effect of the physical disability that is to be taken into account, and that he can train his mind to overcome his sensitiveness on the subject of his lameness just as a pugnacious individual can be expected to do something to keep his pugnacity under control. It still seems to me that the man who is cross-eyed, or is suffering from a withered leg or a grossly overgrown bulbous nose or staring eye-balls like the lady in the thriller can reasonably be expected to boil over as a result of provocation having reference to those physical defects more than the ordinary reasonable man who has no imperfections whatever mental or physical; and that both judge and jury should look with a more kindly eye on a defence which seeks to take his physical peculiarities into account. After all, the question is as to whether the provocation is sufficient to negative malice; and surely the onus of showing that should be more easily discharged in the case of a lame man taunted with his lameness than in the case of the imaginary man who has no mental or physical peculiarities whatever.

National temperament

One very important aspect of the matter arises from divergences in character and temperament due to nationality. The mental as well as the physical constitution of the Samoan differs materially from that of the European. As the Samoan is subject to a criminal law which was designed for the person of British nationality and which has been interpreted by British courts on the highest level, is he entitled none the less to have taken into account what might be regarded from the British point of view as his racial peculiarities? Logically he could perhaps expect that indulgence, with regard to a crime committed in Samoa. It would no doubt be consistent with common sense that the term "reasonable man" in Samoa is equivalent to a reasonable Samoan, or perhaps even a reasonable person of part Samoan blood; as there are many such persons who were born here and have no other country. But what is to happen if a Samoan in New Zealand—and there are many—should be tried for murder in New Zealand and should plead provocation? Presumably he would have to be judged according to the mental standard of an imaginary reasonable New Zealander; because, if I correctly read the dictum of the Lord Chancellor in *Bedder's* case, it would not be proper notionally to invest the hypothetical reasonable man in New Zealand with the physical or mental peculiarity of the accused here, namely the peculiarity of being a Samoan. Just as a reasonable man is never unusually pugnacious or lame or impotent or suffering from blindness in one eye, so presumably a reasonable man in a British country is not a Samoan. This question does not appear to have been judicially decided in New Zealand.

HELLO DER. HONEY.

Perhaps the same problem arises in Britain with regard to the Jamaican invasion. If a Jamaican resident in Britain is charged with murder and the defence of provocation is raised, what are then the attributes of the "reasonable man" whose standard of conduct is to determine the issue? Whatever may be the rule regarding the provocation of a Jamaican in Jamaica, it would appear that there are only the two alternatives in the case of a Jamaican charged with murder in Britain. Either the reasonable man mentioned in section 3 of the Homicide Act, 1957, is British by birth, possessing no peculiarities such as being cross-eyed, lame, impotent or Jamaican, in which case the reaction of the Jamaican to provocation must be judged solely by the hypothetical effect of such provocation on the mind of the reasonable Englishman. Or alternatively, the reasonable man, though he is still debarred from being cross-eyed, impotent or lame, is at least entitled to be a Jamaican living in a country not his own; in which case a practical difficulty would arise, in the case of a murder committed in Soho or other districts where foreigners abound, of satisfying judge and jury of the difference in the reaction to provocation in the case of some nationality other than British. No doubt this latter would create an impossible situation which could not be accepted by the courts. It must, therefore, be concluded that in the British Isles a reasonable man cannot be a Jamaican. I am assuming that the Jamaican temperament differs from the British, just as the Samoan does.

A vagrant thought creeps into my mind: can a reasonable man in Wales be a Welshman, or does he have to maintain the same physical and mental degree of reasonableness as a Yorkshireman in Leeds? My own experience—which, admittedly, is limited to contacts in the Army—tends to show that a Welshman is liable to show a more violent reaction to provocation than the comparatively placid gentleman from Devon or Somerset. If there is such a difference, I suppose it would be improper notionally to invest the reasonable man with the peculiarity of being a Welshman. In the matter of national reasonableness, can one discriminate between kingdom and principality, between county and county?

This may appear to be mere hair-splitting of very little practical interest to those concerned in the administration of the criminal law in England. The matter, however, is one of some moment in the courts in this part of the world. It would appear that a reasonable interpretation of the law would be this: The attributes of a reasonable man in any country are those of an ordinary member of the indigenous race. In Samoa a reasonable Samoan; in Jamaica a reasonable Jamaican. But if a Samoan decides to live in New Zealand then his reaction to provocation must legally be no different from that of a reasonable New Zealander. In other words, within New Zealand a reasonable man, who has no peculiarities, cannot be permitted the peculiarity of being a Samoan. In the same way a Jamaican in England must not, if tried for murder, be judged by the standards of a reasonable Jamaican. It is possible that there is no judicial authority for this solution of the problem. The solution also creates a difficulty in the case, for example, of a New Zealander on a tour of duty in Samoa. If he had the misfortune to be tried for murder there, it would be a little awkward for him if his plea of provocation were to be decided with reference to the mental characteristics of the ordinary reasonable Samoan. It might well be urged for the prosecution that in his case, that of a foreigner in Samoa, the reasonable man could not be notionally invested with the peculiarity of being a New Zealander.

Bail in Criminal Law

By J. B. Egan, LL.B.

As an introductory step it is interesting to note that, at common law, there are several types of bail which are usually classified as follows:

(a) Common bail, which is given to a sheriff after he has arrested a person, or what is known as a bail bond, entered into by two sureties, on condition that the defendant appears where and when commanded by the arresting process.

(b) Special bail or bail to the action are persons who undertake, generally after the appearance of a defendant, that if the latter should be condemned in the action he will satisfy the debt, costs and damages or transport himself to the proper prison, or if not, that they will do it on his behalf.

(c) Bail on an attachment. When a defendant is arrested under a writ of attachment he is taken before a court or judge and is sworn to answer interrogatories. He is then committed to prison unless, with leave of a court or judge, he is prepared to enter into a recognisance with sureties for his appearance in court to answer interrogatories relating to such matters as may be objected against him.

But as arrest on mesne process has been abolished bail in civil cases is now almost extinct although it seems that it may still be of some importance in landlords' actions of ejectment. We are, however, here concerned with a brief study of the law relating to bail in the realm of criminal law. In this sphere bail is given for the appearance of the person bailed to stand his trial or to attend a further examination. The word "bail" when used accurately means the contract whereby a person is "bailed" or delivered to his surety, but it is also used to describe the surety himself. It is not, perhaps, generally realised that the surety if he wishes to free himself is allowed to arrest the accused in order to return him to the custody of the court by which he was bailed. There are various stages in a criminal process at which it becomes relevant to be aware of the position as to the obtaining of bail and we must now consider these in some detail.

Warrant backed for bail

When a magistrate issues a warrant for the arrest of a person he may, if he thinks fit, back it for bail. That is to say, in addition to directing the arrest of the person named therein, it also provides that he shall be released on bail pending court proceedings either on his own recognisance or on producing sureties. This provision as to bail is sometimes written on the back of the warrant and hence its name. Unless the person laying the information has good reason for opposing bail, a warrant should always allow bail so as to keep at a minimum the injury caused to the accused, who is, of course, at this stage unconvicted of any offence.

Powers of Police to grant bail after arrest without warrant

After a person has been arrested without a warrant a police officer not below the rank of inspector or an officer who is in charge of the station to which the person is brought, may, and if it will not be reasonably practicable to take him before a magistrates' court within twenty-four hours after arrest must, look into the case and, unless the offence charged seems to the officer to be a serious one, release him on bail on his entering into a recognisance, either with or without sureties, for a reasonable amount to appear before the court at the time and place specified in the recognisance.[1] Moreover, if it appears to the officer that the police investigation cannot be completed forthwith he has power to discharge the prisoner, under the same conditions, requiring him to appear at such police station and at such time as is specified in the recognisance unless, before that time, he receives a written notice from the police officer in charge of that station informing him that he need not attend.[2] This recognisance may be enforced as though it were conditioned for the appearance of the accused before a magistrates' court of the area of petty sessions in which the police station mentioned in the recognisance is situate.

Where a person who is apparently under the age of seventeen is arrested either with or without a warrant and it is not possible to bring him immediately before a court of summary jurisdiction, a police superintendent or other officer of equal or higher rank or the officer in charge of the station to which the prisoner is taken must inquire into the facts of the case and has power to release him on a recognisance being entered into either by the prisoner himself or by his parents or guardian. The recognisance, which may be accepted either with or without sureties, will be for such a sum as will, in the opinion of the officer, secure the accused's attendance at the hearing. The police officer, moreover, must release the young prisoner unless it is a charge of homicide or other serious crime or unless it is necessary, in the interest of the accused, that he should be taken away from association with a criminal or a prostitute. Further, there is no duty to release the accused where the officer reasonably believes that such a step would defeat the ends of justice.[3] If a person apparently under the age of seventeen is not so released on bail he must, if possible, be detained in a remand home until the hearing of the case. In the case of certain offences against children and young persons which are mentioned in the First Schedule to the Children and Young Persons Act, 1933, any person arrested without a warrant must be allowed bail unless such a step would have the effect of tending to defeat the ends of justice or of exposing to injury or danger the victim of the alleged crime.[4] These offences are (a) the murder or manslaughter of a child or young person, (b) infanticide, (c) certain offences under the Offences against the Person Act, 1861, and the Criminal Law Amendment Act, 1885, (d) any offence of incest concerning a child or young person, and (e)—(1) various types of cruelty to persons under sixteen, (2) causing or encouraging the seduction or prostitution of a girl under sixteen, (3) allowing a person under sixteen to be in a brothel, (4) causing or allowing a person under sixteen to be used for begging, (5) exposing children under seven to the risk of burning, (6) causing or procuring or, in the case of a parent or guardian, allowing a person under sixteen to take part in a performance endangering life or limb.

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[1] Magistrates' Courts Act, 1952, s. 38 (1).

[2] *Ibid.*, s. 38 (2).

Release on bail pending trial

Examining justices have power in all cases, apart from a charge of treason, to release the accused on bail. The magistrates have to decide whether bail can be allowed and, if so, on what terms. If they decide to allow it they ask the accused to give a recognisance, with or without sureties, which is conditioned for his appearance at the trial for which he has been committed. The examining magistrates have also power, as an alternative, to merely fix the amount of the recognisance so that it may be taken at a later date and to commit the accused into custody in the meantime. By the Magistrates' Courts Act, 1952, s. 7 (3), they have also power to grant bail to a person who is in custody merely because he has been committed into custody for trial. This power only extends up to the time of the first sitting of the court of trial. In certain cases special terms may be insisted upon, such as, for example, to order the accused to surrender his passport or to report daily to the police. There is, as we have seen, no power in the magistrates to grant bail in cases of treason. Here only a Secretary of State or a judge of the Queen's Bench Division has the power. In cases of felony and misdemeanour magistrates have a discretion as to the question of bail. With regard to felonies, one should refer to the case of *R.* v. *Phillips*,[5] for a review of the matters to be considered in deciding how to exercise the discretion. In the case of misdemeanours the magistrates, at common law, when the preliminary inquiry was completed were bound to release the prisoner if he was able to find sufficient bail. By the Statute 11 & 12 Vict. c. 42, s. 23, the examining magistrates obtained a discretion in the matter in cases of certain misdemeanours such as, for example, obtaining by false pretences, perjury and riot. In addition they were granted this power of discretion in any misdemeanour the costs of the prosecution for which could be charged against the administrative county. The Costs in Criminal Cases Act, 1908, provides that the costs of the prosecution for all misdemeanours may be so charged and would appear to remove this distinction between felonies and misdemeanours. It is not customary to allow bail in cases involving charges of murder or attempted murder unless the Crown is prepared to consent or unless the facts appear to indicate a verdict of justifiable homicide. It has been said to be undesirable to grant bail in cases of housebreaking where the accused is, while free, likely to repeat the offence [6]; and see the recent cases mentioned later in this article. In the case of a misdemeanour, if bail is refused on committal for trial the accused must be informed of his right to apply to a High Court judge.[7] Such an application is made by summons to a judge in chambers. In considering the question of bail it is perfectly proper for the justices to be informed as to the accused's previous convictions.

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[3] Children and Young Persons Act, 1933, s. 33 (1).

[4] *Ibid.*, s. 13 (2).

When examining magistrates allow bail the result is not strictly to set the accused at liberty but is merely to free him from the custody of the law and to place him in that of his own sureties. The latter are under an obligation to bring the accused for his trial at the time and court specified. The sureties have, as has already been stated above, power to seize the accused, and by returning him to the custody of the law, they can secure their own discharge. If this happens, then unless the prisoner is able to obtain new bail, he will once more be imprisoned. As the sureties must bind themselves in a specified sum it is, of course, desirable from the court's point of view that they should have sufficient means to find that sum and they may be examined on oath as to their means. As a rule only householders are accepted.

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[5] (1947) 32 Cr.App.R. 47.

[6] *Ibid.*

[7] Criminal Justice Administration Act, 1914, s. 23.

When allowing bail the examining justices have to decide on the amount of bail required, the number of sureties and whether the same are sufficient.[8] It is well established that in deciding whether or not to grant bail the justices must consider the type of offence involved, the strength of the prosecution's case, the gravity of the possible punishment if the charge should be proved, the character and behaviour of the accused, the wealth of the accused (since this might result in his deciding to forfeit his bail rather than surrender for trial), the question of whether the sureties are truly independent or whether they have been indemnified by the prisoner and the possibility that the accused might " get at " the prosecution's witnesses if he were at liberty. It should be noted that agreements between an accused and his sureties providing for indemnity if the former does not surrender for trial are void as contrary to public policy, in addition to which they are, it seems, indictable offences being conspiracies to pervert the course of justice. Regarding the possibility of the accused tampering with witnesses it seems that justices are not so quick to grant bail during a preliminary inquiry when all the depositions have not yet been taken than after the inquiry. As far as one can tell, without possessing any official figures, it is not very common for persons who have been allowed bail to fail to surrender for their trial. At any rate the judiciary have said on numerous occasions that bail should readily be allowed and that it should often be sufficient to accept the recognisance of the accused without the necessity of sureties unless the magistrates have good reason for supposing that he would not surrender for trial if released. The judges have said that this is especially so if the offence is not a grave one and the date of trial is some time off. If no bail is allowed, or the accused is not able to find any, he is committed to prison on the authority of a warrant of the examining justices to be kept there until trial, but, of course, this detention or confinement is merely for safe custody and is not intended as a punishment as there has been, as yet, no conviction. When making decisions as to bail justices are acting judicially and not ministerially.[9] A justice who refuses bail from improper motives may be indicted and, if he is influenced by malice, he lays himself open to a civil action.

In deciding on the amount of the bail it is, of course, well known that the Bill of Rights forbids " the demanding of excessive bail " and so the justices must use their own discretion in arriving at a figure which, while adequate, is not " excessive." In exercising their discretion they have to take into account the various factors mentioned above as being relevant in relation to the decision to allow bail at all. In *Ex p. Speculand* [10] it was held that a judge of the King's Bench Division had no inherent jurisdiction to reduce the amount of bail where the magistrates, in the exercise of their statutory powers, have fixed it in a specified sum. On the other hand *Ex p. Thomas* [10a] heard in the Queen's Bench Divisional Court in December 1955 is authority for the proposition that, where the accused at the preliminary inquiry has been allowed bail in a sum which in his view is so excessive as to make it impossible for him to avail himself of it, the correct procedure is for him to apply *ex parte* to the Divisional Court for a writ of habeas corpus on the grounds of a contravention of the Bill of Rights.

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[8] *R.* v. *Saunders* (1847) 2 Cox C.C. 249.

[9] See *Linford* v. *Fitzroy* (1849) 13 Q.B. 240, at p. 247.

We have been considering for the most part the position after committal, but if it does not prove possible to complete the preliminary examination at one sitting the justices may either remand the accused in custody for up to eight days on a warrant or for three clear days by means of a parol order. Alternatively, they may allow him bail, in which event, with the consent of both the accused and the prosecution, it is permissible for the remand to be for a period in excess of eight days.

Summary trials

The question of bail may also arise in the course of a trial by a court of summary jurisdiction. Such a court may from time to time adjourn the proceedings until any future date it thinks fit. Of course the justices must not adjourn a case indefinitely in order to avoid having to reach a decision, and if the accused is in custody then the adjournment must be reasonably short. Before conviction the adjournment must not exceed eight days. There is also a power of adjournment after conviction but before sentence for not more than three weeks to enable inquiries to be made for the purpose of determining the most suitable method of dealing with the case. In the event of such adjournments the court has power either to allow the accused to remain at liberty or to commit him to a remand home or centre or to prison according to his age. Alternatively, the accused may be allowed bail on entering into a recognisance either with or without sureties, conditioned for his surrender for the continuation of the adjourned trial. By section 26 (1) of the Criminal Justice Act, 1948, where an offence is punishable on summary conviction with imprisonment and the court is satisfied that the accused has committed the offence it has power to remand him either in custody or on bail for up to three weeks so that he may be medically examined and a report made with regard to his physical or mental condition.

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[10] [1946] K.B. 48.

[10a] [1956] Crim.L.R. 119.

Having discussed this subject in relation to both preliminary inquiries and summary trials let us now look at one or two recent cases in which the question of bail has been in point. In *R.* v. *Pegg* in the Court of Criminal Appeal in March 1955 the appellant P. had been allowed bail by county magistrates and while at liberty had committed four further serious offences. During the hearing of an application for leave to appeal the Court of Criminal Appeal pointed out that the justices had been wrong to allow bail on committing the appellant for trial since it was, in general, incorrect to allow bail after committal in cases where is was not suggested that there was any defence and where the prisoner had a very bad record. In this case the appellant had a very bad record and had merely been given an opportunity of committing further crimes while on bail. In *R.* v. *Wharton*, which was another 1955 case, the accused, while on bail in connection with one charge, committed robbery with violence for which he received a sentence of five years' imprisonment. On his applying to the Court of Criminal Appeal for leave to appeal in July 1955 the court said that it had pointed out on many occasions that, unless the justices were really in doubt as to the result of the case, men with bad records ought not to be granted bail and that to do so was in no way an act of kindness. In the present case it had merely resulted in another crime and an additional sentence for the prisoner. Yet another similar case came before the Court of Appeal in December 1955 in *R.* v. *Gentry*. There G. had been convicted at quarter sessions of offences of garage breaking and stealing and sentenced to eight years' preventive detention. While on bail in respect of these offences he had committed a further offence and also left the country. In the course of refusing the application for leave to appeal, Lord Goddard C.J. said: " As the court has said on many previous occasions, it is inadvisable to grant bail to men with long criminal records . . . unless there was a very real doubt as to the man's guilt."

Bail in the High Court

As we have already seen there are circumstances in which it becomes necessary to apply for bail to the High Court. Thus, if bail is refused by the magistrates an application may be made to the High Court. Also where a court of summary jurisdiction commits a person for trial for a misdemeanour and refuses bail it must inform him of his right to apply for the same to the High Court judge. Yet again, in *Re Whitehouse*,[11] it was held that notwithstanding the provisions of the Criminal Justice Act, 1948, s. 29 (1), whereby justices, when sending a person convicted before them of an indictable offence to quarter sessions for sentence, must commit him into custody and therefore have no power to admit him to bail, nevertheless, if such person has appealed against his conviction then the High Court, by virtue of section 37 (1), has power to admit him to bail pending the hearing of his appeal.

In general, an application to the High Court must be by way of summons before a judge in chambers to show cause why bail should not be allowed. The summons must, at least twenty-four hours before the day of the hearing, be served on the prosecutor and on the Director of Public Prosecutions if he is carrying on the prosecution and, unless the judge otherwise orders, on the coroner or committing justices. The application must usually be supported by an affidavit and accompanied by an affidavit of service. Also, unless the judge dispenses with the same, a certified copy of the commitment and a copy verified by affidavit of any depositions taken in the proceedings are required.

There is a very useful provision in the Rules of the Supreme Court whereby an accused, who is in custody and who, through lack of means, is unable to obtain the services of a solicitor, may give written notice to the judge in chambers stating that he would like to obtain bail and requesting that the official solicitor should act for him in his application. The judge then has power to assign the official solicitor, in which event the judge can, if he thinks fit, dispense with many of the formalities mentioned above and deal with the matter in a summary manner. If the judge decides that the applicant shall be allowed bail on entering into a recognisance either with or without sureties or on giving other security before a magistrate, the recognisance and the surety, if any, must be entered into or the other security given before the magistrate just as if it were entered into or given under the provisions of the Magistrates' Courts Act, 1952. When a judge has made such an order the magistrate must have the recognisance of the accused and any surety or a statement of any other security given sent to the clerk of the court to which the accused has been committed or, in any other case, to the clerk of the court which committed him. Also, unless the recognisance was entered into at the prison, a copy of the recognisance or of the statement must be sent to the governor of the prison. Should the released accused subsequently fail to appear for trial the recognisance or the security may be enforced in the manner provided by the Magistrates' Courts Act, 1952. We have seen above that a High Court judge has no inherent jurisdiction to reduce the amount of bail fixed by justices in the exercise of their statutory powers.[12] Nor has the High Court inherent jurisdiction to allow bail to a convicted person.[13]

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[11] [1951] 1 All E.R. 353.

When a person is being tried by the High Court the court of trial may, of course, allow bail either while he is awaiting trial or during the trial. It is not, however, usual to allow bail after the signing of the indictment if the offence is of a serious character. But by the Habeas Corpus Act, 1679, s. 6, if a person who has been committed for treason or felony is not tried at the first sessions of oyer and terminer or general gaol delivery after his commitment, he may demand to be allowed bail save where evidence on oath is given that the prosecution witnesses could not then be present. If on the accused's application to be tried he is not tried at the second sessions, he must be discharged. Further, by the Assizes Relief Act, 1889, if an accused who has been committed to quarter sessions is not tried at the next sessions, then the court of assize may, on his application and in the absence of such special reasons to the contrary as are set out in the Act, either try him or discharge him. If there are any such special reasons the court of assize may admit him to bail. And if the accused is not tried or discharged in either of these ways and is not tried before the next assizes, then the assize judge must then try or discharge him.

Court of Criminal Appeal

An appellant may be admitted to bail by this court pending the determination of his appeal, if the court thinks fit but there must be some exceptional circumstances and bail will not, it seems, be allowed if there is no prospect of the appeal succeeding. The power of allowing bail may be exercised by a single judge and the time during which the appellant is free on bail pending the appeal is disregarded when computing the length of the sentence. If the court allows bail pending the appeal it must specify the amount of the recognisances and may specify before whom they are to be entered into. If, however, the court does not give any such directions the recognisance of the prisoner may be taken before a magistrate who is a member of the visiting committee of the prison in which the appellant is detained or even before the governor.

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[12] *Ex p. Speculand* [1946] K.B. 48.

[13] *Ex p. Blythe* [1944] K.B. 532.

The recognisance of a surety may be taken before any court of petty sessions. An order for bail may be revoked or varied on any occasion when the appellant is before the court. If an appellant is not allowed bail, he is, pending the determination of the appeal, to be given special treatment.[14]

Conclusion

Many people may regard the question of bail as an unimportant or at least a secondary matter, but, of course, it is most important for the prisoner, and as one author has said, " To refuse release without the most anxious consideration is to stand with John against Magna Carta and with the Stuarts against the Commonwealth." In practice, bail seems to be granted more readily in some courts (we are here talking of magistrates' courts) than in others. It is obvious that bail can be of considerable value to an accused and that it is a great advantage in the preparation of his case. He is able to consult with his advisers as often as he wishes rather than having to be content with a conference within the prison. He is able to discuss the case with friends and make efforts to find possible witnesses. Magistrates should therefore not be slow to allow bail and this applies equally when the accused is not legally represented. Often, of course, the police oppose the granting of bail fearing perhaps that the prisoner might not surrender for trial. There is, of course, the difficulty that the police may wish to oppose bail because of the accused's past record which would be likely to influence him not to surrender. If the police disclose the past convictions to the magistrates the accused will very likely feel that he is being prejudiced since this bench, at any rate, is aware of his record. The magistrates may therefore be inclined to put their trust in the officer in charge of the case and it seems that they very often assume that his objections to bail are justified without looking into the prisoner's record, as they are strictly entitled to do. Statistics show that by far the greater number of prisoners who are allowed bail honour their recognisances. Perhaps an important reason for this is that the sureties, if any, are usually close friends who the accused would be reluctant to " let down."

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[14] Prison Act, 1952, s. 47 (4) (*c*), and the Prison Rules, 1949.

Offences under Sections 11 and 12 of the Road Traffic Act, 1930

By Keith C. Clarke

Prosecuting Solicitor, Southampton Corporation

5. Evidence and Aiding and Abetting

Evidence

In the last two articles in this series, we have been considering the third and most important element which the prosecution must prove in all cases under sections 11 and 12, *viz.*, that the vehicle was, in fact, driven carelessly or dangerously, etc. We shall now consider first a number of matters relating to evidence generally in these cases:

(i) In *Hallett* v. *Warren*,[1] the defendant was charged with driving in a dangerous manner under section 1 of the now repealed Motor Car Act, 1903, and the prosecution appear to have stressed the point that, at a particular place, the defendant's car came into collision with a motor-cycle. However, there was no direct evidence as to the actual collision and the prosecution sought to call four witnesses who could testify as to the manner in which the car was driven four-fifths of a mile, a mile and a quarter, and two miles away from the scene of, and shortly before, the collision. The magistrates decided that such evidence was not relevant by reason of distance only, and the Divisional Court held that they were wrong in law. Avery J. pointed out that, even if the prosecutor had presented the case to the justices on the basis that the allegation of dangerous driving was limited to the place where the collision occurred, it was wrong in law to say that no inference as to the defendant's manner of driving at that place could be drawn from his manner of driving at the places where he was seen by the witnesses. The weight to be attached to such evidence would, of course, be a matter for the justices. Lord Hewart C.J., after pointing out that the magistrates ought to have admitted the evidence of the witnesses, expressed the view that, whatever the magistrates may have thought about the incident involving the collision, it would have been their duty to convict if they had been satisfied, after hearing the evidence of the witnesses who saw the defendant's car at various spots prior to the collision, that the car was driven dangerously at those places. The fact that the places in question were not specified in the information did not affect the matter, because they were within the jurisdiction of the justices and, if the defendant was taken by surprise or misled on account of this, he would, by virtue of section 9 of the Summary Jurisdiction Act, 1848 (now section 100 (2) of the Magistrates' Courts Act, 1952) be able to ask for an adjournment on this ground. Although, in this case, the defendant was charged with dangerous driving, there seems to be no reason why these principles should not apply to cases under section 12.

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[1] (1929) 93 J.P. 225.

It therefore appears that, where the prosecution have evidence of the way in which the vehicle was driven at several places within short distances and spaces of time, they may issue one summons, mentioning all the places therein, and proceed either on the basis that collectively these incidents amount to dangerous or careless driving, or on the basis that they rely in the main upon one particular incident, and that the others tend to throw some light upon this. In such a case, the justices could convict if they decided that the car was driven dangerously or carelessly at any of the places referred to in the evidence for the prosecution. However, where there are several separate and distinct acts of dangerous or careless driving, the prosecution should issue separate informations in respect of each incident, and if this is not done and all the incidents are referred to in one information the defence may properly call upon the prosecution to elect which incident they will proceed upon.

(ii) When a person is charged under section 11 with driving in a dangerous manner or recklessly, the court will have regard to "all the circumstances of the case," and it follows that evidence of the speed at which the vehicle was being driven will be admissible. Such evidence was admitted in *Beresford and another* v. *Richardson*[2] (a case under section 1 of the now repealed Motor Car Act, 1903) and in this case Darling J. said: "The manner of driving has to be considered with reference to the place, the amount of traffic, the chance of being able to stop, and the pace. That is the manner of driving, and the root of the offence of driving in a manner dangerous to the public is excessive speed."

Conversely, where the charge under section 11 is one of driving at a dangerous speed, it appears that evidence may be given of such matters as overtaking in busy traffic in such a way as to form three lines of traffic travelling in the same direction[3] and overtaking without giving a signal on a bend.[4] However, in Scotland the prosecution appear to be limited to calling evidence as to speed only, where the charge is one of driving at a dangerous speed.[5]

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[2] (1921) 85 J.P. 66.

[3] *Baker* v. *Williams* (1956) 54 L.G.R. 197.

(iii) In prosecutions under section 11, a police officer may properly give evidence, not only of his estimate of the amount of traffic using the road at or about the time of the offence, but also of traffic which might normally be expected to be on the road at that time.[6] In order to constitute the offences of driving at a dangerous speed and in a dangerous manner, it is not necessary to establish actual danger to any member of the public. The offences appear to be complete if, in view of the speed of the car or the manner in which it was driven, potential danger to traffic which might reasonably be expected to be on the road is established.[7]

(iv) In *Wells* v. *Woodward*,[8] the magistrates convicted a motor-coach driver, who had entered a cross-roads controlled by traffic lights and collided with another vehicle, of driving in a dangerous manner. The driver of the other vehicle had lawfully entered the cross-roads from a road at right angles to the one upon which the defendant had been driving when the lights were green in his favour, and the magistrates decided that, in the absence of evidence to the contrary, they were entitled to assume that the traffic lights were working properly and that the lights controlling the defendant's vehicle were, at the relative time, showing red. The Divisional Court upheld this decision.

(v) The general common law rule that a wife is not a *competent* witness for the Crown against her husband applies to charges under the Road Traffic Act, 1930. In *Parson* v. *Tomlin*, the magistrates wrongly allowed a wife to give evidence against her husband on a charge of driving at a dangerous speed, but the Divisional Court refused to quash the conviction because there was ample evidence to support it without the evidence of the wife, which had not affected the decision in any way.

(vi) The question of whether the court should permit evidence to be given that the defendant has taken some alcoholic drink, when he is charged with an offence under sections 11 or 12 only, has been much debated and most courts appear to take the view that, if the prosecution are not prepared to rely upon their evidence of the defendant's condition to the extent of preferring a charge of driving under the influence of drink, etc., under section 15 of the

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[4] *Bracegirdle* v. *Oxley* [1947] 1 All E.R. 126; 111 J.P. 131.

[5] *Galloway* v. *Adair*, 1947 S.C.(J.) 7.

[6] *Parson* v. *Tomlin* (1956) 120 J.P. 129.

[7] *Kingman* v. *Seager* (1938) 101 J.P. 543; *Bracegirdle* v. *Oxley* [1947] 1 All E.R. 126.

[8] (1956) 34 L.G.R. 142.

1930 Act, they ought not to mention drink in order to bolster up a charge under section 11 or 12. It has been said that such evidence ought not to be admitted because:

(a) The court is only concerned with the manner in which the vehicle was driven, and evidence tending to show the possible reason why it was so driven is not relevant; and

(b) It would inevitably arouse prejudice against the defendant.

On the other hand, a number of people hold the view that, in certain circumstances, evidence of the defendant having taken drink ought to be admitted in cases under sections 11 and 12. It has been urged that such evidence would be relevant where it could clearly be shown that the way in which the vehicle was driven was undoubtedly a result of the drink which the driver had consumed. Indeed, the Lord Chancellor has said in the House of Lords that, in cases of this kind, judges and benches ought to consider the circumstances and admit evidence of the defendant having taken drink if they think it relevant and exclude it if they think it is *merely* prejudicial (debate on the former Road Traffic Bill, March 14, 1955). Also, there is the Scottish case of *Burrell* v. *Hunter*,[9] where, in a charge under section 11, it was alleged that the offence was committed by the accused " while suffering from a nervous disorder aggravated by the consumption of alcohol." The Sheriff Court admitted evidence in support of this allegation.

It is felt, however, that, although there may well be exceptional cases where such evidence could be said to be relevant, it ought *never* to be admitted on account of the prejudice which it would arouse against the defendant. The criminal courts in this country have rightly earned a reputation throughout the world for protecting the interests of accused persons and dealing with them in a scrupulously fair manner. It was because of the possible prejudice to a defendant that, in *R.* v. *Pomeroy*,[10] the Court of Criminal Appeal held that a charge of dangerous driving should not be tried together with a charge of driving whilst disqualified, even though it is possible in law for such charges to be tried together. For the same reason, the Court of Criminal Appeal has held that a charge of driving under the influence of drink, etc., under section 15 of the 1930 Act should not be tried together with a charge of motor manslaughter, even though counsel for the defence is prepared to consent to the charges being tried together.[11] In the last-mentioned case, it was also held that, in a charge under section 15 of the 1930 Act, the use of the word " drunk " should be avoided. Some recent discussions on this matter are to be found in 121 J.P.N. 719; 122 J.P.N. 13 and 112, and 103 S.J. 159, 173 and 218.

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[9] 1956 S.L.T.(Sh.Ct.) 75.

[10] (1935) 25 Cr.App.R. 147.

[11] *R.* v. *Carr* (1932) 24 Cr.App.R. 199.

Aiding and Abetting

The final point which remains to be considered is the matter of charging a person with aiding and abetting the commission of an offence under section 11 or 12. In deciding whether or not to issue a summons for aiding and abetting, the general test should be applied, *i.e.*, if a person knows that the acts which constitute the offence are being done and he *helps* in any way, then he commits the offence of aiding and abetting.[12] The most obvious example is that of the person who sits next to the driver and who encourages him to speed and take risks, etc. However, the qualified " supervisor " of a learner-driver appears to be in a special position. In *Rubie* v. *Faulkner*,[13] a learner-driver was convicted of careless driving because, on a bend in the road, he drew out from behind a horse and cart onto his offside of the road and collided with an oncoming vehicle. The " supervisor," who was sitting next to the driver and who had done and said nothing to prevent this, was convicted of aiding and abetting the offence, because he had failed to discharge the duty he had undertaken by his passive conduct in circumstances which required him to be active. Hilbery J. pointed out that a qualified " supervisor " has the duty of making up, as far as possible, for the learner's incompetence. The following points should also be noted:

(a) If A only is driving a vehicle and B is assisting him in some way, then it may be that A will be summoned with an offence under section 11 or 12 and B for aiding and abetting A in the commission of that offence. In such a case, B must be acquitted if A is found not guilty of the offence with which he is summoned.[14]

(b) In *Du Cros* v. *Lambourne*,[15] it was held that a person who was summoned for driving a car at a dangerous speed under section 1 of the now repealed Motor Car Act, 1903, could, on that summons, be convicted of the principal offence, even if the evidence showed that he was aiding and abetting the commission of the principal offence by another person, not summoned. The reason for this decision is that, in the case of offences less than felony, those who aid and abet are principal offenders and it therefore makes no difference that the other person has not been summoned. In this case, there was a conflict of evidence, as a result of which it was difficult to ascertain whether the defendant was driving the car or whether he was sitting in the front passenger seat whilst the car was being driven by a friend of his. The court of quarter sessions had found it unnecessary to decide who was driving the car, since, in any event, the defendant, who was an experienced driver, must have known that the speed at which it was being driven was dangerous, having regard to all the circumstances of the case, and accordingly the court of quarter sessions dismissed an appeal by the defendant against his conviction by the magistrates' court. The Divisional Court held that the decision of the court of quarter sessions was correct in law.[16]

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[12] *Ackroyds, etc.* v. *D.P.P.* [1950] 1 All E.R. 933; 114 J.P. 251.

[13] [1940] 1 All E.R. 285; 104 J.P. 161.

[14] *Thornton* v. *Mitchell* [1940] 1 All E.R. 339; 104 J.P. 108.

[15] (1906) 70 J.P. 525.

Appeals in Habeas Corpus Cases

By ANTHONY THOMPSON, *Barrister-at-law*

Since the Judicature Acts the law of habeas corpus had been uncertain and confused until the recent case of *Re Hastings* in the Divisional Court of the Queen's Bench Division clarified it in a way which no one had anticipated.

The writ of habeas corpus may be used to determine the legality of a civil or criminal incarceration, and as regards civil matters the law seems reasonable though perhaps inexplicable whereas in criminal matters it may be explained, albeit unreasonable.

To determine the matter of guardianship of infants or any other question of civil detention the unsuccessful litigant may appeal from the refusal of a judge to issue a writ to the Court of Appeal and thence to the House of Lords, with the words of Lord Birkenhead in *Secretary of State* v. *O'Brien* [1] to reassure him. After observing that a person discharged under a writ was free once and for all, Lord Birkenhead went on, at p. 610:

> "Correlative with this rule, and markedly indicative of itself of the spirit of our law, is that other rule which established that he who applies unsuccessfully for the issue of the writ may appeal from court to court until he reaches the highest tribunal in the land."

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[16] See also the decision of a metropolitan magistrate reported in [1956] *Journal of Criminal Law* 308.

[1] [1923] A.C. 603.

Few would quarrel with that position, yet it is hard to understand how this could be a correct statement of the law. In *Cox* v. *Hakes* [2] Lord Halsbury L.C. affirmed the principle that once a person had been discharged no appeal would lie, and his reason for doing so was that no right of appeal existed in habeas corpus cases. The speech of Lord Bramwell is even more interesting. The Court of Appeal had considered that it had power to hear the appeal under section 19 of the Judicature Act:

> " The Court of Appeal shall have jurisdiction and power to hear and determine appeals from any judgment or order . . . of Her Majesty's High Court of Justice . . ." In the House of Lords Lord Bramwell, concurring with the Lord Chancellor, said, at p. 526: " Section 19 speaks of a judgment or an order, *i.e.*, an order in the nature of a judgment . . . Section 18 transfers certain powers to it [to the Court of Appeal] in which are certainly not included the power of hearing an appeal from a decision as to a writ of habeas corpus."

In the later case of *O'Brien* the Court of Appeal does not seem to have entertained any doubts as to its jurisdiction; Lord Goddard C.J. in an interesting note in 65 L.Q.R. suggests that the court relied upon R.S.C., Ord. 58, r. 10:

> " Where an *ex parte* application has been refused by the court below an application for a similar purpose may be made to the Court of Appeal."

This is hard to reconcile with the previous words of Lord Bramwell, but at least it received the approbation of Lord Birkenhead when the appeal was pursued to the House of Lords.

The law relating to application for writs of habeas corpus in criminal cases has been clarified by the recent case of *Re Hastings* [1958] 2 W.L.R. 768, and it is submitted that the law, although now certain, is most undesirable in its present form.

Until this case came before the Divisional Court of the Queen's Bench Division at the end of last year, it was commonly believed that no appeal would lie against a refusal to issue a writ, but that the unsuccessful suppliant could go from judge to judge until he found one more merciful than his brethren. Indeed even the Lords Goddard and Denning, the former in the note referred to above in 65 L.Q.R. and the latter in *Ex parte Chapple*, and the learned editors of the 3rd edition of Halsbury's *Laws of England*, Vol. 2, p. 49, appear to have laboured under this misapprehension.

There seems to be no doubt that there is no right of appeal against a refusal of a judge to issue a writ in a criminal cause or matter. Before 1873 the only means of questioning any decision of a superior court was by proceedings in Error, and Error did not lie in the case of prerogative writs. The Judicature Act which created the Court of Appeal limited its jurisdiction to civil matters:

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[2] (1890) 15 A.C. 506.

> " No appeal shall lie from any judgment of the High Court in any criminal cause or matter save in some error of law apparent upon the record." [3]

The position was not affected by the creation of the Court of Criminal Appeal as that court can only hear appeals from trials on indictment. The Supreme Court of Judicature (Consolidation) Act, 1925, s. 31 (1), reads:

> " No appeal shall lie—(*a*) except as provided by the Criminal Appeal Act, 1907, or this Act, from any judgment of the High Court in any criminal cause or matter."

In *Amand* v. *The Home Secretary* [4] Viscount Simon L.C. referred to the speech of Lord Birkenhead in *Secretary of State* v. *O'Brien*, but not to the passage quoted above, and was at pains to distinguish between criminal and civil matters, stressing at page 156 that no appeal lies in the former.

It has always been felt that this absence of a right of appeal in criminal matters was compensated for by the right to go from judge to judge and to have a hearing *de novo* on each occasion, as was stressed by Lord Hailsham L.C. in *Eleko* v. *Government of Nigeria*.[5] Denning L.J. (as he was then) in *Ex parte Chapple* [6] affirmed that the Court of Appeal had no power to issue a writ and went on, at p. 936:

> " The only remedy of the subject is to go before another Divisional Court or another judge and hope to persuade someone to take a different view."

Lord Goddard concludes his article in 65 L.Q.R. with these words:

> " In consequence of the Act of 1679 successive applications for the writ to the same or to different courts could be made, and the Judicature Acts leave that right untouched."

In spite of this powerful array of support for the popular belief, Lord Parker C.J. put another interpretation on the position in *Re Hastings*.[7] He distinguishes the words of Denning L.J. and Lord Hailsham L.C. as obiter, and asserts that there never has been a right to go from judge to judge, except during vacation, and that the right was only to go from court to court.

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[3] s. 47.

[4] [1943] A.C. 147.

[5] [1928] A.C. 459.

[6] (1950) 66 T.L.R. (Pt. 2) 932.

[7] [1958] 2 W.L.R. 768.

In argument two 1845 cases were cited: in *Ex parte Partington*[8] Parke B. considered an application which had already been refused by the Court of Queen's Bench, and by the Chief Baron of the Court of Exchequer; at p. 648—

> "This case has already been before the Court of Queen's Bench on the return of a habeas corpus and before my Lord Chief Baron at Chambers on a subsequent application for a similar writ. In both instances the discharge was refused. The defendant, however, has a right to the opinion of every court as to the propriety of his imprisonment, and therefore we have thought it proper to examine attentively the provisions of the statute (for which the suppliant was imprisoned) without considering ourselves as concluded by these decisions."

In another report of the same case[9] an interjection of Pollock C.B. is also noted. Parke B.:

> "On application for a habeas corpus we are bound to make up our minds: and although this matter has already been before another court, still, *in favorem libertatis*, the prisoner is entitled to take the opinion of every court."
>
> Pollock C.B.: "Yes, and of every judge."

In *Re Cobbett*,[10] when refusing an application, Parke B. said:

> "You can go to another court in which you have not been heard. I believe this matter has been heard in the Queen's Bench as well as here, but as it is an application for a habeas corpus you are entitled to the judgment of each court and each judge; and therefore you may go to the Court of Common Pleas."

Lord Parker C.J. in *Re Hastings* deals with *Ex parte Partington* thus: "That the application to the Chief Baron was made in vacation is not expressly stated, but it was anyhow made in Chambers and in view of what we have already indicated as to the practice, we think it reasonably certain that it was made in vacation."[11] Then at p. 777, the Lord Chief Justice deals with *Re Cobbett* in a similar way: ". . . here again, Parke B. may be referring only to the time when the court is not sitting."

Lord Parker C.J. derived some support from the words of Lord Esher M.R. in *Cox* v. *Hakes* when that case was in the Court of Appeal[12]:

> "It is not correct to say that under the old system there could be an application to all the judges in succession. There could be an application to all the courts in succession."

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[8] 13 M. & W. 679.

[9] 9 *Jurist*, Vol. 1, p. 92.

[10] 5 L.T.(o s.) 130

[11] At p. 776.

[12] (1887) 20 Q.B.D. 1, at p. 13.

Although these words were not expressly traversed by their Lordships this decision of the Court of Appeal was reversed on appeal.

Lord Parker C.J. concludes that prior to the Judicature Acts an applicant might go from court to court, and during vacation from judge to judge in search of a writ, and that the effect of the Judicature Act was to fuse all the former courts into one High Court so that now an applicant can only go to one court (except in vacation).

This decision was supported by Vaisey J. in the Chancery Division when the persistent Hastings made an application there, reported in [1959] 2 W.L.R. 454. The effect of these decisions is that as there are no longer any separate courts, only divisions of the same court, a person may apply only once for the issue of a writ.

The objections to the present law are abundantly clear, but it is interesting to note that the colonies are in a happier position than we, for they are governed by the decision of the Judicial Committee of the Privy Council in *Eleko* v. *Government of Nigeria*. In that case Stafford Cripps, K.C., for the Government argued that the Nigerian common law was the same as the English, and that in English law there had never been the right to go from judge to judge to seek the issue of a writ, and that the right to go from court to court had disappeared with the Judicature Acts. In other words, Stafford Cripps, K.C., submitted that the law was exactly as Lord Parker C.J. was to express it some thirty years later in the case of *Hastings*.

Lord Hailsham L.C. accepted that Nigerian common law was the same as English common law, then dealt with the second part of Stafford Cripps's argument, at p. 466:

> "In the 17th century the Habeas Corpus Act, 1640, expressly recognises the right and duty of the Court of Common Pleas to order the writ to issue; and the Habeas Corpus Act, 1679, enacts that it shall be lawful to move and obtain Habeas Corpus as well out of the High Court of Chancery or Court of Exchequer as out of the Courts of King's Bench or Common Pleas or either of them. This latter Act further provided that the Lord Chancellor or any one of His Majesty's justices might grant a habeas corpus in vacation, and imposed heavy penalties upon any judge who refused to entertain the application. It was conceded for the respondent that under the terms of this statute application could be made in vacation to successive judges of the same court. This led to the curious result upon the respondent's argument that if

> application were made in vacation it could be renewed to each judge of the court, but that if it were made in term time it could only be made once to the Court of Chancery and once to each of the three courts of common law. But a far more serious consequence of the respondent's argument would be the effect upon the right to apply for this writ of the Judicature Act of 1873. That statute combined into one court the old High Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas and the Court of Exchequer, together with the Admiralty and Probate Courts and the Court for Divorce and Matrimonial Causes. If, therefore, the respondent is right in contending that an application for a writ of habeas corpus can only be entertained once by any one court it necessarily follows that the effect of the Judicature Act must have been to deprive the subject of the right which he had previously enjoyed of applying successively to the Court of Chancery and to each of the three common law courts, and to limit him in future to one application to the Supreme Court of Judicature. Their Lordships would be reluctant to reach such a conclusion unless compelled to do so by clear words. The writ of habeas corpus is a high prerogative writ for the protection of the liberty of the subject, and it would be a startling result if a statute enacted primarily for the simplification of procedure should have materially cut down that protection. But, in fact, their Lordships do not think that the Judicature Act has had this result, or that the contention of the respondent is well founded."

Lord Hailsham L.C. then went on to consider the words of Parke B. in *Ex parte Partington* quoted above, and concludes:

> "If it be conceded that any judge has jurisdiction to order the writ to issue, then in the view of their Lordships each judge is a tribunal to which application can be made within the meaning of the rule, and every judge must hear the application on the merits. It follows that, although by the Judicature Act the courts have been combined in the one High Court of Justice, each judge of that court still has jurisdiction to entertain application for a writ of habeas corpus in term time or in vacation, and that he is bound to hear and determine such an application on its merits notwithstanding that some other judge has already refused a similar application. The same principle must apply in the case of the judges of the Supreme Court of Nigeria."

As there is no right of appeal the decision of the Divisional Court in *Re Hastings* cannot be overruled, and consequently there can be no alteration without legislation. It is respectfully submitted that some statutory provision is necessary either to restore (or perhaps "create") a right to go from judge to judge to seek the issue of a writ and so bring this country into line with the colonies, or alternatively to establish a right of appeal.

The law at the moment is curious indeed; applicants who can contrive to be unlawfully incarcerated during the vacation are in a much happier position than those whose gaolers seize them during term time. This anomaly makes a mockery of the law. Members of both branches of the profession who are called upon to advise their clients in habeas corpus cases may seriously have to consider the desirability of withholding an application until the end of term.

The nature of any proposed reform must carefully be studied. During the debate of the Criminal Justice Act, 1948, the Attorney-General introduced a clause the effect of which would have enabled any person aggrieved by any judgment of the Divisional Court in a criminal cause or matter to appeal direct to the House of Lords. This clause was rejected in the House of Lords, many members feeling that the words "any person aggrieved" were too wide, as this would give the prosecutor a right of appeal against an acquittal or dismissal of information.

In any event it is by no means certain that this clause would have enabled an appeal to go to the House of Lords in a habeas corpus case. There seems to be no authority for saying that a refusal to issue a prerogative writ is a judgment.

Consequently any reform of the law (which, it is submitted, is urgently required) must be specifically to deal with this question, and should not be included in an omnibus clause which is intended to remedy a multitude of defects.

If and when some statutory alteration is made to the law of habeas corpus, it may well be opportune to confirm in the same instrument the right of appeal in civil applications lest an attempt be made to distinguish as *obiter* the words of Lord Birkenhead, that—

> "He who applies unsuccessfully for the issue of a writ may appeal from court to court until he reaches the highest tribunal in the land."

Case and Comment *

EVIDENCE

Depositions—admissibility as evidence

See R. *v.* HAWKINS AND OTHERS, p. 729, *post.*

LARCENY

False pretences—hire-purchase agreement—bill of sale

R. v. Williams and Hamilton-Walker

Central Criminal Court: His Honour Judge Aarvold: June 30–July 14, 1959.[1]

In an indictment containing thirteen counts the defendants were charged with larceny of cars in their possession under H. P. agreements or Sale or Return agreements, with causing cheques to be delivered to their company by falsely pretending, *inter alia*, that they were entitled to sell the said cars and with causing cars to be delivered to the company by false pretences. The defendants, both of good character, set up in business as dealers in cars with an initial small capital and two cars. They moved to very expensive premises increasing the number of cars bought and sold. Their purchases were financed by loans under Stocking Agreements (which gave them authority to sell the cars concerned) or by H. P. agreements between themselves, a H. P. company and a third party who was another concern owned by the defendants. Payments were made by cheques which were not always met by their bankers. In evidence the representatives of the H. P. companies said that in the case of cars comprised in the H. P. agreements they had no objection to the defendants selling the cars provided they were paid but they still relied upon their title to the cars. At the close of the case for the defendants it was submitted that the H. P. agreements were Bills of Sale and so void (*Polski* v. *S. & A. Services*

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the prosecution: *Cussen* and *Mathew* (instructed by D. P. P.). For Williams: *C. Lawson* (instructed by L. L. de Meza, 24 Bishopsgate, E.C.2). For Hamilton-Walker: *J. Davis* (instructed by Chas. J. Odhams & Sons, 92 Fleet St., E.C.4).

[1951] 1 All E.R. 185; *Mendell* v. *Thomas & Co.* [1891] 1 Q.B. 230; *Re Watson* (1890) 25 Q.B.D. 27). Consequently the property in the cars did not pass but remained in the defendants. Reliance was also placed on section 2 of the Factors Act, 1889. Further the H. P. companies consented to the sales, standing by without interfering when they knew the defendants were endeavouring to effect the sales. In two instances the contracts were agreed by telephone, the property passed at the time of the agreement, the sellers were bound then to deliver the cars and in consequence, no suggestion being made of exercise of the right of stoppage *in transitu* or of lien, the delivery of the cars was not caused by the delivery of the cheques. It would be unsafe to leave the matter in the hands of the jury to decide as a question of fact and His Lordship should exercise his discretion and rule on the question as a matter of law. In reply the prosecution relied upon *R.* v. *Deller* (1952) 36 Cr.App.R. 184. His Lordship ruled that there was evidence which must go to the jury and in summing up instructed the jury that the question whether the H. P. agreements were Bills of Sale depended on whether they believed that the transactions were genuine H. P. agreements or were devices to cover up what was in fact mere loans, if they found the transactions were loans the agreements were void and consequently property did not pass under them to the H. P. companies. In that case there was no larceny and no false pretences as to the right to sell. As regards the alleged consent by the H. P. companies to the sales, if at the time they sold the cars the defendants bona fide intended at once to pay off the H. P. companies, there was no dishonest intent. The jury might think that the position was that the H. P. companies took the view that if the cars were sold and they were paid, they would not complain, but that if the cars were sold and they were not paid, they would rely on their title to the cars, that is in effect that the companies said to the defendants sell at your risk. It was for the prosecution to satisfy them that the transactions between the H. P. companies and the defendants were not mere loans, that the defendants acted dishonestly not intending to pay off the H. P. companies and not believing that their cheques would be met. His Lordship directed an acquittal on two counts where the car concerned had been delivered to the defendants on a sale or return agreement containing special terms and where there was no evidence that those terms had come to the notice of the defendants.

Verdict: Not guilty all counts. [C. B. ORR, *Barrister-at-Law*.]

Commentary. It would appear the defendants were the original owners of the cars and that they purported to sell them to the H.P. company and to take them back on hire-purchase terms. A transaction which takes this form may, in substance, amount to no more than a loan of money on the security of the car. The " price " which the " seller " receives for the car is the loan, which he repays with interest through the " hire-purchase " instalments. The " buyer," in substance, is a mortgagee of the car. Where such a transaction is effected in writing the document is a bill of sale within the Bills of Sale Act (1878) Amendment Act, 1882, s. 3, and is void unless registered under section 8 of the Act. If, on the other hand, the sale and re-hiring is not a mere device for effecting a loan on security but is genuinely the transaction which it purports to be—this would seem to be a question of intention —then the transaction is perfectly valid, though unregistered.

If, therefore, in the present case the transactions amounted to bills of sale they were entirely void and the defendants remained the owners of the cars throughout. As owners in possession, they could not be guilty of larceny. If the transactions were valid, the defendants became bailees and capable of committing larceny under section 1 (1) of the Larceny Act, 1916. Even in this case, however, they would not be guilty if the H.P. company consented to their selling the cars for it is an essential of larceny that the taking be " without the consent of the owner."

If the defendants in fact had no right to sell the cars (*i.e.*, the sale and hire-purchase transactions were valid and the H.P. company did not consent to the sales) then their offering them for sale no doubt constituted an implied misrepresentation (*cf.* section 12 (1) of the Sale of Goods Act, 1893) sufficient to found an indictment for obtaining by false pretences. If the defendants in fact had a right to sell the cars but believed that they had no such right (*i.e.*, the H.P. company did not consent to the sales, but the transactions were invalid though the defendants did not realise this—the situation in *R.* v. *Deller* (above)) they could not be guilty of either larceny or obtaining for, though they had *mens rea* there was no *actus reus*. Whether they could have been convicted of an attempt to commit either crime is a question to which there is no definite answer in English law but it is submitted that the correct answer, in principle, is that they could not. *Cf.* " Two Problems in Criminal Attempts," 70 Harv.L.R. 422.

Larceny by a trick—obtaining credit by fraud—goods on approval —evidence—depositions—admissibility as evidence

R. v. Hawkins and Others ✓

Leeds Assizes: Barry J.: July 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22, 23, 27.[2]

The prisoners were charged with a considerable number of offences set forth in three indictments, upon the second of which they were principally tried. This indictment contained thirty-nine counts of conspiracy to defraud, larceny and obtaining credit by fraud. They had obtained a large number of radio and television sets, tape-recorders, washing machines, etc., from various shopkeepers by purporting to take these goods on credit-sale agreements and making no payments for the goods apart from the deposits thereon.

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[2] For the prosecution: *G. de P. Veale, Q.C.*, and *D. J. Clarkson* (instructed by Town Clerk, Leeds). For the defence—For Hawkins: *A. M. Hurwitz* and *V. R. Hurwitz*; For Gogan: *D. Chapman* and *H. C. Muscroft*; For

In the course of the evidence for the prosecution leave was sought under section 13 (3) of the Criminal Justice Act, 1925, to read the deposition of Mrs. Smith, the wife of one of the shopkeepers, on the ground that she was far advanced in pregnancy and the birth of her child was expected within a few days. Counsel for Whittaker and Barker objected to the reading of certain passages in her deposition as they would have wished to challenge the accuracy of the witness's recollection in respect to those matters. They cited *R.* v. *Linley* [1959] Crim.L.R. 123.

It was objected for the prosecution that Whittaker had been represented in the magistrate's court and there had been no cross-examination of Mrs. Smith as to these matters. Defence counsel replied that even if this were a valid objection no charge had been made against Barker at all in respect of this transaction when he was before the examining magistrate and the charge against Whittaker was a different charge to that against him on the indictment. Counsel for J. Higo sought to have certain parts of Mrs. Smith's deposition read.

Held, that the deposition could be severed, and the part to which objection had been taken should not be read. The remainder of the deposition might however be read.

At the close of the case for the prosecution, it was submitted by counsel representing several of the accused (*inter alia*) that there was no case to answer on a number of counts of larceny.

These were laid (so far as is material) in respect of two different sets of circumstances:

(1) Where the goods were obtained under agreements which purported to be hire-purchase agreements and which contained the usual provision that the property in the goods would not pass until all instalments had been paid.

Donald Nicholson: *Miss H. Paling*; For Ernest Nicholson: *J. M. Dodson* and *M. R. R. Davies*; For Cullingworth: *E. Lyons*; For Whittaker: *J. Hampton*; For P. Higo and Barker: *H. H. Ognall*; For Maloney and Hessian: *H. C. Beaumont* and *A. Lonsdale*; For Collinson: *V. R. Hurwitz*; For J. Higo: *A. Myerson.* (Instructing solicitors: For Hawkins, Gogan, E. Nicholson, Maloney, Barker and Hessian: J. Sorkin & Co., Leeds; For D. Nicholson and Whittaker: Bernard B. Fielding, Leeds; For Cullingworth: J. Levi & Co., Leeds; For Collinson: Louis Godlove & Waterman, Leeds; For P. and J. Higo: Leslie Gould, Leeds).

Johnson, the shop manager for Messrs. W., admitted that the agreements which he had intended to make with the accused were credit-sale agreements and that he had intended to pass the property in the goods. It was argued that the real agreement was a credit-sale agreement, and if the purported hire-purchase documents were not in fact void for illegality, they were void for common mistake, since both sides appeared to be mistaken as to their nature. In these circumstances the proper charge would have been obtaining credit by fraud, not larceny. Counsel referred to *Archbold* (34th ed.) §§ 1483 and 1497. The prosecution replied that the question was not what Johnson thought he was doing, but what he in fact did. He in fact entered into hire-purchase agreements and the offence was therefore larceny.

The submissions were rejected.

(2) Where the goods were in the first place taken on approval, and the accused had within a day or so returned to the shop, had informed the dealer that he was satisfied with the article in question and had entered into a credit-sale agreement and paid the deposit thereon.

The counts alleged larceny on the date on which the goods were first obtained, not on the date on which the credit-sale agreement was made. Under cross-examination the dealer agreed that he considered that a firm agreement had been entered into between himself and the accused. It was argued that as there had been perfectly proper credit-sale agreements there could not be larceny. It was not larceny to obtain goods on credit without making any false pretences. Further, there was no evidence that the accused were prepared to keep the goods if no credit-sale agreement was concluded. There was no settled intention at the time the goods were taken on approval: there was solely an intent conditional on a credit-sale agreement being entered into, and that could not be larceny. Counsel cited *R.* v. *Jones* (1910) 4 Cr.App.R. 17; *R.* v. *Wilks* (1914) 10 Cr.App.R. 16 and *Folkes* v. *King* [1923] 1 K.B. 282.

The prosecution replied that these were cases of larceny by a trick: the larceny was at the time of taking away. Where the goods were obtained on approval, there could be no question of the property in those goods passing at that moment. It was the prosecution's case that the obtaining on approval was merely a fraudulent device for obtaining possession of goods for which the accused at no time intended to pay.

The submissions were rejected.

A further submission was made by counsel for P. Higo with regard to a count of larceny of a radio set from Messrs. L. The document under which the set was obtained was a credit-sale agreement, but it had not been signed by the vendors. The shop manager said that it was the practice not to sign the agreement until payments had been completed. Counsel contended that the shop manager had intended to pass the property in the set and had authority from his employers to pass the property (citing Roscoe, *Criminal Evidence*, 16th ed., pp. 673–674).

Held, that in cases where the shop manager has no legal knowledge, the court must have consideration of the actual transaction. The submission was rejected.

The accused were all subsequently convicted.

[JOHN M. COLLINS, *Barrister-at-Law*.]

Commentary. (i) Though Mrs. Smith was, no doubt, " so ill as not to be able to travel " within the words of section 13 (3) of the Criminal Justice Act, 1925, it seems clear that the admissibility of the deposition was a matter within the discretion of the court (*R.* v. *Linley*) and that it should be admitted only if it was plain that no possible injustice could result to anybody.

Where it is proposed to contradict the evidence in chief of a witness called by the other side, he should be cross-examined upon the evidence in question to give him an opportunity of explaining the contradiction; and failure so to cross-examine (in civil cases at least) may be taken to imply acceptance of the witness's story and to preclude contradiction of it; *Browne* v. *Dunn* (1893) 6 R. 67; *cf. R.* v. *Hart* (1932) 23 Cr.App.R. 202. It is thought, however, that a similar failure to cross-examine before the examining magistrate stands on an entirely different footing and, since the evidence which went unchallenged there could be challenged at the trial, failure to cross-examine at the preliminary inquiry (though possibly a matter for consideration) should not, in itself, preclude objection to the reading of a deposition.

(ii) Where a rogue, by fraud, induces a hire-purchase agreement intending to make off with the goods without paying for them, he is guilty of larceny by a trick as soon as he takes possession. Where he similarly induces a credit-sale agreement he is guilty of obtaining by false pretences as soon as the property passes, which is usually on the conclusion of the agreement. Where a rogue obtains goods under a hire-purchase agreement without fraud and subsequently fraudulently disposes of them, he is guilty of larceny as a bailee. But where the rogue obtains goods under a credit-sale agreement without fraud and dishonestly decides not to pay for them, he is guilty of no crime; for, under such an agreement, he is the owner of the goods and an owner in possession can never be guilty of larceny, nor is he guilty of obtaining the goods by false pretences or obtaining credit by fraud, neither the passing of the property nor the granting of credit being induced by fraud.

The alleged common mistake of the parties as to the nature of the transaction raises difficult questions. It is submitted that the distinction between larceny by a trick and false pretences depends, not on the owner's *intention* to pass property or merely possession, but on whether property *actually* passes (obtaining) or the rogue merely gets possession (larceny): *cf.* [1958] Crim.L.R. 92. If, then, the hire-purchase agreements were valid there was an *actus reus* of larceny and not of obtaining, notwithstanding Johnson's abortive intention to pass the property. The question of *mens rea*, however, remains. If the accused, as the result of his fraud, thought he was getting ownership of the goods, he had the *mens rea*, not for larceny but for obtaining by false pretences. The position then is closely analogous to that which arose in *D. P. P.* v. *Neiser* [1958] 3 W.L.R. 757; [1959] Crim.L.R. 128 where the accused thought he was receiving goods obtained by felony (itself a felony) whereas in fact he was receiving goods obtained by a misdemeanour (itself a misdemeanour), and consequently could not be convicted of either crime. The application of a similar principle would produce a similar (and equally absurd) result in the situation posed. In *Neiser* the presence of the words " knowing the same to have been stolen . . . " in section 33 of the Larceny Act, 1916, left the court with no choice; but in the situation posed, it is thought likely that the court would feel free to limit the requirements of *mens rea*. Although, in the case posed, the accused thought that he was receiving ownership (and, if he were, he could not be guilty of larceny) he did intend " permanently to deprive the owner " of the goods and he had no " claim of right made in good faith " which are the only elements of *mens rea* expressly required by the Larceny Act.

Where the accused by fraud obtains not only possession of the goods but also power to pass the property in them, this, in the criminal law, is equivalent to obtaining the property and his crime is obtaining by false pretences and not larceny: *London Jewellers* v. *Attenborough* [1934] 2 K.B. 206; *Whitehorn Bros.* v. *Davison* [1911] 1 K.B. 463. Where goods are obtained on approval the prospective buyer has power to pass the property (*Kirkham* v. *Attenborough* [1897] 1 Q.B. 201) and it is therefore respectfully submitted that the second submission was correct and the argument of the prosecution, which seems to have been accepted, wrong.

Where goods are obtained on approval without fraud, there is obviously no obtaining by false pretences or obtaining credit by fraud. Can the prospective buyer be convicted of any crime if he subsequently makes off with the goods, not intending to pay for them? Though he is a bailee, it is submitted that he cannot be convicted of larceny as a bailee because the owner has given him power to pass the property to himself and, therefore, his conversion of the goods to his own use cannot be said to be " without the consent of the owner." The owner does not consent to his not paying the price—but for this he has only a civil remedy. In this case it would seem that the dishonest buyer commits no crime.

With regard to the final submission by counsel for P. Higo; if (as was apparently the case) the manager, with the authority of his employer, intended to pass the property in the set, the property would pass, notwithstanding the fact that no document had been signed. In that case, there could be no larceny. If, on the other hand, the arrangement was intended to be " subject to contract " and binding on neither party until the document was signed, no doubt Higo became a bailee and was guilty of larceny.

MUSIC LICENCES

Music licences refused — juke boxes played in cafés — whether " places for public music "

Gillingham Corporation v. Hogan, Same v. Supple

North Aylesford Magistrates' Court: May 22, 1959.

At the North Aylesford Magistrates' Court on May 22, two café proprietors were fined £100 and £50 with 50 guineas and 30 guineas costs respectively for keeping places for public music without a licence between March 7 and April 20, 1959, contrary to section 51 (5) of the Public Health Acts Amendment Act, 1890. On March 6 both proprietors had applied for and been refused licences by the magistrates in respect of the playing of juke boxes in their cafés. Evidence was given in both cases that the juke boxes had continued playing and this was not disputed. Counsel for the proprietors claimed that following the case of *Quaglieni* v. *Matthews* (1865) 6 B. & S. 474 the music was subsidiary to the café business and therefore a licence was not required and that the case was similar to *Brearly* v. *Morley* [1899] 2 Q.B. 121 where the landlord of a public-house was held not to have contravened the Act by the provision of a piano in the bar which his customers could use. He distinguished *Amusement Equipment Co., Ltd.* v. *McMillan* (1941) 85 S.J. 333, where the Divisional Court had approved a finding of the justices that the playing of a juke box constituted public music by contending that in this case the juke box was one attraction among fifty-four other machines of amusement value whereas in a café it was subsidiary to the main business of the café. For the prosecution it was contended that the juke boxes created an attraction and reference was made to the case of *McDowell* v. *Maguire*, 118 J.P. 555, where customers of the public-house formed a concert party and as a result the place was kept for public music although the performers were not paid by the landlord. Lord Goddard C.J. pointed out the importance of the words in the case stated by the justices that " if the licensees did not give the public a little extra by way of entertainment there would not be a reasonable livelihood for him because trade was at such a low ebb." The playing of music was not subsidiary or connected with the café business but was an independent attraction (*R.* v. *Tucker* (1877) 2 Q.B.D. 417).

In respect of one of the cafés counsel for the defendant contended that from March 17 the room containing the juke box had been divided by a partition and that as the juke box was in the private part of the room which had been formed into a club for members only no licence was required and referred, *inter alia*, to the case of *Bellis* v. *Burghall* (1799) 2 Esp. 722. Counsel for the prosecution did not accept that this constituted the premises a private club on the facts and contended that in any case the music was clearly heard in the public part of the café and in fact could be heard in the street. The court decided that the offence in this case covered the whole of the period charged.

ROAD TRAFFIC

Careless driving—disqualification until passing a driving test

Ashworth v. Johnson; Charlesworth v. Johnson

Sheffield City Quarter Sessions: G. S. Waller, Esq., O.B.E., Q.C., Recorder: August 12, 1959.[3]

These were two appeals against sentences passed by Sheffield Magistrates upon convictions for driving without due care and attention contrary to section 12 of the Road Traffic Act, 1930. They were two of three cases of careless driving heard by the same bench of magistrates on the same morning. In each of the three cases the magistrates had imposed an identical penalty—a fine of £10, an endorsement of the conviction on the driving licence and an order under section 6 (3) of the Road Traffic Act, 1934, disqualifying the defendant from holding or obtaining a driving licence until he or she should have passed a driving test. Both appellants had had no previous convictions for any driving offence. As this was their first conviction for careless driving, the maximum period of disqualification which could be imposed under Road Traffic Act, 1930, s. 12 (2), was one month: counsel for the defence stated that the customary waiting-time for a driving test in Sheffield was eight to ten weeks. The defendant who did not appeal had, however, as a result of a special application by the clerk to the magistrates, been enabled to take his test after three weeks.

In the first case, Mrs. A, a widow aged 49, had driven her car from a side road at a "T" junction and had collided with a vehicle coming from her right which she had failed to observe. Although the road on which the other vehicle was travelling was a busier road, there was no "Major Road Ahead" sign on the side road, and the prosecution conceded that in every other respect she was driving perfectly properly. Mrs. A had passed her driving test in 1939 and had since driven for twenty years without being involved in any accident. She pleaded guilty before the magistrates.

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[3] For the appellants: *H. S. Pears* (instructed in the first case by Harold Jackson & Co., Sheffield; in the second case by Arthur Jackson & Co., Rotherham). For the prosecution respondent: *G. Milner* (instructed by John Heys, Town Clerk, Sheffield).

In the second case, C had attempted to overtake a stationary tram car. It was impossible to pass it on the inside as a vehicle was parked there. Another vehicle was parked on the opposite side of the road. A car which C was following overtook the tram car on its outside, going on to the wrong side of the road. When C attempted to follow, he was confronted by a vehicle approaching him on its proper side of the road and a collision ensued. He pleaded not guilty before the magistrates, but was convicted. He had passed his driving test only one year before, but the magistrates were not informed of this. It was said on his behalf that he had taken the test on his doctor's advice in order to take out his wife, who suffered from disseminated sclerosis.

Held, that the powers of the court under section 6 (3) of the 1934 Act should be used in respect of people who are growing old or infirm or who show in the circumstances of the offence some kind of incompetence which requires looking into. These powers were to be contrasted with the powers of disqualification for a specified period which was part of the penalty imposed by the court. Section 6 (3) on the other hand, was not a punitive section, but was intended as a section for the protection of the public against incompetent drivers.

In the first case, Mrs. A. was merely careless and inadvertent and there was nothing about the circumstances of the case which suggested that she was ordinarily an incompetent driver. Her appeal against disqualification would be allowed with costs.

The second case was rather a bad case of careless driving and the sentence imposed by the magistrates would be varied by increasing the fine to £20 and removing the disqualification. There would be no order as to costs.

[JOHN M. COLLINS, *Barrister-at-Law.*]

Commentary. The case lays down a principle concerning section 6 (3) which seems, with respect, to be fully justified by the nature of the provision made by that subsection and one which should be followed.

SENTENCE

Disqualification until driving test passed—reasons for imposition—careless driving

See ASHFORD *v.* JOHNSON, CHARLESWORTH *v.* JOHNSON, p. 735, *ante.*

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by HENRY PALMER, *Barrister-at-Law*

Imprisonment

In R. *v.* ALI the court (Gorman, Paull and Elwes JJ.: August 18, 1959) reduced a sentence of three years' imprisonment to one of eighteen months' imprisonment. A. had been convicted at a magistrates' court of larceny and sentenced by a Crown court. A., who was a man of twenty-three years of age, had three previous convictions. In 1950 he was fined for stealing and in 1953 put on probation for loitering. He served in the army from 1955 to 1957 and was discharged with a " very good " character. He was then convicted of burglary in 1958 and sentenced to nine months' imprisonment. The present offence was committed in April, 1959 (six months after his release from prison), when he arranged a bogus robbery of £113, money belonging to his company, on his way to the bank. He took the money home, but before he could share it with his confederate the police arrived and recovered all but £7. The court stated that, in all the circumstances, they felt that three years' imprisonment was too heavy and, accordingly, the sentence would be reduced to eighteen months' imprisonment.

Preventive detention

In R. *v.* MOULTON the court (Gorman, Paull and Elwes JJ.: August 18, 1959) reduced a sentence of eight years' preventive detention to one of twelve months' imprisonment. M. had been convicted at a magistrates' court of two offences of obtaining £3 16s. National Assistance benefit by false pretences and sentenced by quarter sessions. M., who was a man of thirty-one years of age, had thirteen previous convictions. He was sent to an approved school in 1941 and sent back again in 1944. He was sentenced to Borstal training in 1945, twelve months' imprisonment in 1949, six months for importuning in 1950, twenty-one months for numerous false pretences in 1952 and a conditional discharge in 1955 for stealing 7s. Later in 1955 he stole £4 10s. from a fellow lodger and received three years' and six months' to run concurrently. Since his release from prison in January, 1958, he had been living on National Assistance until the present offences were committed in August, 1958. The court stated that they had been very concerned about this sentence. In view of the appellant's record, the nature of the offence and the whole of the circumstances the sentence was too high and, accordingly, the sentence of preventive detention would be reduced to one of twelve months' imprisonment.

Acts and Orders *

London Traffic

The following Order has been made detailing prescribed routes: S.I. No. 1273 (Hornchurch) (2d.).

Probation

Part III of the principal Regulations (S.I. 1954, No. 1049) applied to probation officers and clerks paid out of the Metropolitan Police Fund (except those who chose not to become subject to the Probation Officers (Superannuation) Order, 1948) the provisions of the local Act superannuation scheme administered by the London County Council. The London County Council have adopted a new consolidated superannuation scheme and these regulations apply the provisions of that scheme to the probation officers and clerks with modifications similar in effect to those contained in Part III of the principal Regulations. Operative August 1, 1959. PROBATION OFFICERS AND CLERKS (SUPERANNUATION) (AMENDMENT) REGULATIONS, 1959 (S.I. No. 1288) (3d.).

Road Traffic

The Regulations of 1958 (S.I. 1958, No. 1281) varied the provisions of the First Schedule to the Road Traffic Act, 1930, by providing that as respects vehicles on special roads there shall be a speed limit only in the case of vehicles which are drawing certain trailers and are not articulated vehicles and that that limit shall be 40 m.p.h. The 1958 Regulations expired on August 1, 1959, and are now replaced by these Regulations which are permanent. Operative August 1, 1959. MOTOR VEHICLES (SPEED LIMIT ON SPECIAL ROADS) REGULATIONS, 1959 (S.I. No. 1279) (3d.).

For penalties for contraventions, see section 10 of the Road Traffic Act, 1930.

The Second Schedule to the Special Roads Act, 1949, specifies classes of traffic for the purposes of special roads, and the composition of Classes I and II of those classes of traffic was varied by the Special Roads (Classes of Traffic) Order, 1958 (S.I. 1958, No. 1280), by excluding from Class I motor-cycles with a cylinder capacity of less than 50 c.c. and vehicular agricultural machinery, and by excluding from Class II vehicles used for the conveyance of abnormal indivisible loads, other than those constructed for naval, military, air force or other defence purposes. The 1958 Order expired on August 1, 1959, and is replaced from that date by this Order which continues the variation in the composition of Class I vehicles but does *not* continue the variation in the composition of Class II vehicles. SPECIAL ROADS (CLASSES OF TRAFFIC) ORDER, 1959 (S.I. No. 1280) (3d.).

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* Prepared by F. MAURICE DRAKE, *Barrister-at-Law.*

The Order of 1955 (S.I. 1955, No. 1038) (as amended by S.I. 1956, Nos. 932, 1265 and 828) is further amended by providing that (a) where vehicles used for the carriage of abnormal indivisible loads under the authority of that Order are so used on a special road, the overall width of the vehicle or of the vehicle and its load shall not exceed 14 feet and (b) where vehicles used for or in connection with the carriage of abnormal indivisible loads under the authority of that Order are so used on a special road, the speed limits imposed on such vehicles when so used on other roads shall not apply. Operative August 1, 1959. MOTOR VEHICLES (AUTHORISATION OF SPECIAL TYPES) (AMENDMENT) ORDER, 1959 (S.I. No. 1281) (3d.).

Street Offences

STREET OFFENCES ACT, 1959 (7 & 8 Eliz. 2, c. 57) (6d.). Operative August 16, 1959. This Act deals with the punishment of professional prostitutes convicted of loitering or soliciting in public places for the purpose of prostitution, with the punishment of certain offences in connection with night cafés, and with the punishment of persons convicted of living on the earnings of prostitution. Section 1 (1) makes it an offence for a common prostitute to loiter or solicit in a street or public place for the purpose of prostitution. Two elements are necessary to the offence, proof that the accused is a common prostitute, and proof that she was loitering or soliciting on a particular occasion for the purpose of prostitution. Section 1 (2) prescribes the penalties for this offence, the maximum being a fine not exceeding £10 on a first conviction and not exceeding £25 on a second conviction. On a third or subsequent conviction the maximum penalty is a fine not exceeding £25 or imprisonment for up to three months or both. Section 1 (3) enables a constable to arrest without warrant anyone he finds in a street or public place and suspects, with reasonable cause, to be committing an offence under section 1 (1). Section 1 (4) defines " street " as including any bridge, road, lane, footway, subway, square, court, alley or passage, whether a thoroughfare or not, which is for the time being open to the public; and includes also the doorways and entrances of premises adjoining the street, and any ground adjoining and open to the street. Section 1 (5) repeals the existing provisions on street soliciting, namely provisions included in the Metropolitan Police Act, 1839 (2 & 3 Vict. c. 47), the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), and the corresponding provisions in local Acts for the City of London and Manchester. It further provides that conviction under these repealed provisions shall for the purposes of that Act be taken into account as a previous conviction in the same way as a conviction of an offence under this section.

A system of cautioning is to be adopted by the Police to ensure that innocent women are not charged with offences under this section. This system is not given statutory form in the Act, but was outlined by the Lord Chancellor in the debate on the Second Reading of the Act by the House of Lords (H.L., Vol. 216, cols. 74 and 75). The procedure is that no woman who has not been previously convicted of soliciting is to be charged with committing an offence under section 1 (1) of the Act unless she has twice been formally cautioned. To effect a caution it will be necessary that the woman should have been kept under observation by two officers, who are thereby satisfied by her demeanour and conduct that she is in fact loitering for the purpose of prostitution. They will then tell her what they have observed and that they intend to caution her. Details of the caution will subsequently be recorded at the relevant police station and at a central register (for the Metropolitan Police District).

Section 2 contains provisions for an appeal to a magistrates' court against the registration of the caution. This must be made within fourteen clear days of the caution being given. The appeal proceedings are to be heard *in camera* unless the woman otherwise desires. Unless the court is satisfied that the woman was, on the occasion, guilty of loitering or soliciting for the purpose of prostitution it shall order that no caution be entered and that any entry already made be expunged.

Section 3 enables the courts to impose higher monetary penalties for certain offences in all-night cafés in which prostitutes or other undesirable characters assemble, and to order the forfeiture of a refreshment house licence on a first conviction, instead of on a second conviction as under the provisions of section 26 (1) of the Licensing Act, 1949 (12, 13 & 14 Geo. 6, c. 59).

Section 4 raises from two years to seven years the maximum term of imprisonment for living on the earnings of prostitution or (in the case of a woman) for exercising control over a prostitute. The Second Schedule to the Sexual Offences Act, 1956 (4 & 5 Eliz. 2, c. 69), is amended accordingly. The maximum punishment on summary conviction for these offences remains imprisonment not exceeding six months (section 37, Sexual Offences Act, 1956).

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 11 *New Fetter Lane, E.C.4." The questions of readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.*

61. *Obtaining by false pretences—hire-purchase agreement—part exchange*

W. enters into an agreement with a finance company in relation to the purchase by him of a motor-car from a firm of motor dealers (M. Ltd.). W. makes out a cheque for £*x* as initial payment under the agreement, this cheque is subsequently found to be worthless.

Ten days later W. sells the car obtained by the worthless cheque and obtains from another motor firm the sum of £*y* and a second-hand car. The prosecutor asks that W. be summoned to answer charges (1) obtaining from M. Ltd., a motor-car by false pretences with intent to defraud, contrary to section 32 (1) of Larceny Act, 1916. (2) (In relation to the subsequent sale) larceny as bailee of a motor-car the property of the finance company, contrary to section 2 of Larceny Act, 1916. (3) Obtaining a valuable security, namely, a cheque for £*y* and a motor-car by false pretences with intent to defraud from Z motor dealers, contrary to section 32 of Larceny Act, 1916.

I contend in relation to the proposed charge (2) that since W. obtained the property and possession of the car by fraud he cannot be considered a bailee. The *Oxford English Dictionary* defines a bailee as "One to whom goods are committed in trust for a specific purpose" and "bailment" as "Delivery for a specific purpose . . . delivery in trust upon a contract expressed or implied that the trust shall be faithfully executed." I also contend that if the agreement is void then the ownership reverts to the motor dealers.

If these contentions are correct then in relation to charge (2) it seems doubtful if any criminal offence has been committed. Fraudulent conversion appears to be ruled out since the original obtaining was fraudulent. I have in mind the possibility of there being a case of larceny by a trick since on the day of the sale to Z motor dealers by W. it was the taking by W. from M. Ltd. (to whom ownership had reverted) of the car of which W. had obtained possession but the property in which was in the original owners.

If the above points are valid it is appreciated by virtue of section 44 of Larceny Act, 1916, they may be of little significance, but it is probable that application will be made for summary trials.

[F. N. H.]

Answer

It is assumed that it can be proved that W. knew that the cheque he gave could not be met.

As far as obtaining of the car from M. Ltd. is concerned, it seems that this cannot be the misdemeanour under section 32, because by his false pretence he does not obtain the full interest in the car but only possession (see *R.* v. *Kilham* (1870) L.R. 1 C.C.R. 261). M. Ltd. (acting as agents for the finance company) did not mean to make W. the full owner of the car, but only a bailee under the hire-purchase agreement. If W. meant to sell the car as soon as he got it, there is no bailment, and the offence is larceny by a trick (see *R.* v. *Pear* (1779) 1 Leach 212). In such case, the subsequent sale of the car is no further offence by him against the owner, but only some evidence of his intent at the relevant time, *i.e.*, when he got possession of the car.

If, although dishonest with regard to the cheque, W. meant to hold as bailee and pay the instalments, then there is a bailment and his subsequent disposal of the car is larceny by a bailee.

In either case, however, a subsequent disposal of the car to which he had no title meant that he makes a false pretence as to his title and he thus obtains the cheque and the second motor-car by false pretence contrary to section 32. [D. W. E.]

Letter to the Editor

Postponement of sentence

Sir,

At [1957] Crim.L.R. 633 you were kind enough to print a letter from me drawing attention to judicial disapproval of postponement of sentence. I referred to some dicta of Lord Goddard in *Easterling* (1946) 32 Cr.App.R. 5, which seemed nevertheless to admit the desirability of postponement where there was a possibility of stolen property being recovered or information given.

In *West* (1959) 43 Cr.App.R. 109, the Recorder postponed sentence for six months to enable West, who had been convicted of fraudulent conversion and forgery, to make restitution by weekly payments. West paid nothing and was then sentenced to three years' corrective training. In substituting a sentence of eighteen months' imprisonment, the Lord Chief Justice, in the Court of Criminal Appeal, once more emphatically disapproved the use of a criminal sentence as a threat to extract money from a convicted person.

It remains clear that this cannot be done, but it is still not clear whether the dicta in *Easterling* mean anything. The possibility perhaps remains that Lord Goddard had in mind the restoration of stolen property *in integrum*, or the giving of information to the police, as opposed to the payment, in effect of damages. But even so, is it any the less objectionable to use the threat of a criminal sentence to this end? If not, then surely the Court of Criminal Appeal could find time to tell us why not, *i.e.*, whether, and in what circumstances it is ever appropriate to postpone sentence.

Yours faithfully,
C. HOWARD.

Department of Law,
University of Queensland.

Books and Periodicals

Book reviews:

Attorney for the Damned. Edited by Arthur Weinberg. Published by Macdonald. xxiii and 552 pp. including index. 30s.

Clarence Darrow, an American attorney, became known as the Attorney for the Damned by his spirited defences of those who had already been convicted by the prejudiced opinions of large sections of the public. He was at the height of his powers during the opening decades of this century, and this collection includes extensive extracts from his addresses to the jury in a number of leading cases.

His career was dedicated to fighting oppression in all its forms and his nickname gives a misleading impression of the causes for which he fought so fiercely. This period of American history provided ample opportunity for Darrow to display his powers. His most famous success was perhaps in succeeding in obtaining life sentences for Leopold and

Loeb instead of the death sentences sought by the prosecution, but his major contribution was his battle against racial intolerance, industrial oppression, religious bigotry and prejudice. The verbatim record of the part he played in these struggles makes fascinating reading.

It is a peculiarity of the American constitution that leading political, economic and religious issues are often principally fought in the courts. Darrow's powers as a controversialist were displayed, therefore, in circumstances which attracted great publicity to themes of fundamental importance. For this reason alone this collection is worth having for the light it throws on a period of American history important for the struggle to secure a more liberal régime in labour relations and other aspects of American life.

But the strongest light is thrown on Darrow himself. Emotional, deeply sincere, fluent and completely without fear, Darrow's defence of his clients reads like a statement of fundamental truths. He could show a mastery of the intricate organisation of a whole industry, as he did in the 1903 Pennsylvania Miners Arbitration. But his gift was in the enunciation of basic human rights and needs. His style can best be described as Old Testament, for he brought all the fervour of the prophet to the court; but he never forgets that his main task is to convince the jury and his emotional outbursts are never allowed to alienate the jury's opinion.

The structure of his speeches is loose and repetitive and his arguments will not always stand up to close examination. The total impact, however, is formidable.

Whilst his major concern is with the human issues so close to his heart he has also a gift for the telling detail. This is sometimes used to good effect in describing the characters of his clients. It is more often used as an offensive weapon against his opponents and his ironic portraits can be devastating. An example is his description of a corrupt warden of a State Penitentiary: " Fortune in some mysterious way had picked up Whilman; nature meant him for a butcher. Necessity made him a drayman, and a rotten political machine placed him at the head of the state penitentiary."

The book is edited with restraint by Arthur Weinberg who has provided commendably brief court histories of the cases from which these speeches are taken. The foreword is by Justice Douglas, a judge of the U.S. Supreme Court well known for his liberal opinions and his words may serve as an epitome of the book. " While there has been much written about Clarence Darrow, nothing quite gives the full flavour of the man as do these addresses. Here is Darrow in the raw —as fresh as the day he spoke."

G. I. DE D.

Books received:

The Chief. By Robert Jackson. London: George G. Harrap & Co. 1959. 338 and (bibliography and index) 11 pp. 21s. net.

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1959

THE
CRIMINAL LAW
REVIEW

November 1959

The British legal system criticised

In the course of the trial in Switzerland of Donald Brian Hume for, *inter alia*, murder, attempted murder and armed robbery, the public prosecutor, Dr. Paul Lienhart, made a number of criticisms of the British legal system.

Hume had been released from prison in February, 1958, having gained remission for good conduct of his 12-year sentence for complicity in the murder of Stanley Setty. After his release he sold his confession to the murder of Setty to a newspaper for £2,000.

Dr. Lienhart said that it was a mistake that no probationary period, no control and no supervision was ordered when Hume was released from prison. He was able to change his name (he was charged in Switzerland under the name of Brown) and obtain a new passport without any precautionary steps being taken.

Dr. Lienhart also criticised as a failing in English law that it is not possible for an appeal by the Crown if it is subsequently discovered that a person has been incorrectly or insufficiently sentenced.

To consider this last criticism first. We are most strongly opposed to any alteration in the criminal procedure of this country which would undermine the principle which insists that no one shall be tried twice for the same offence, and that no appeal lies against an acquittal, whatever evidence may subsequently come to light.

The right to plead *autrefois acquit* or *autrefois convict* is fundamental to the liberty of the subject as we understand it. Conviction and punishment or acquittal by due process of law must " wipe the slate clean," as far as a particular crime is concerned. It would be totally wrong to allow our judgment in this matter to be swayed because one unbalanced, though admittedly dangerous, criminal was able to boast that he had "got away with murder," and go on to commit murder again.

Hume is an isolated case, albeit a shocking one, but what seems to us to be, if anything, even more shocking is that a newspaper with a large circulation, owing a duty to the public which extends beyond mere "entertainment," should be willing to pay for and publish Hume's confession. It undermines a fundamental principle of English law, that a criminal should not profit from his crime.

Our system may perhaps be more open to criticism on the question of supervision of discharged prisoners. In fact, at present, the only supervisory provision in our law is the requirement in the case of discharged prisoners released after sentences of twelve months' imprisonment or more who have two or more previous sentences of imprisonment or a sentence of corrective training. These are required to report their addresses to the police from time to time for a period of twelve months after release.[1] The Advisory Council on the Treatment of Offenders has recommended, in a report dated July, 1958, that even this be dropped as the information obtained has no value to the police and no other purpose is served by the requirement.

The requirements for compulsory after-care apply only to a small group of prisoners let out on licence. They do not even apply to all prisoners who, on grounds of good conduct, have part of their sentence remitted.

It is, however, doubtful whether after-care, whose object is principally reform of the prisoner, would be a satisfactory preventative. The Advisory Council on the Treatment of Offenders recognised this when they recommended that the major part of extending the scheme of compulsory after-care should await the results of a research project designed to measure the relationship between after-care and the prevention of crime.

It is, we think, worth considering whether there is not a class of criminal who should be subjected to supervision rather than "after-care."

The treatment of young offenders

The Advisory Council on the Treatment of Offenders has now reported [2] on the proposals for changes in the custodial treatment of young offenders put forward in the White Paper, "Penal Practice in a Changing Society."[3] The Council agree that the changes are both necessary and desirable.

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[1] Criminal Justice Act, 1948, s. 22; Prison Act, 1952, s. 29 and Sched. 1.

[2] The Treatment of Young Offenders, H.M.S.O., 1s. 9d.

The main objects of the proposals are (a) to keep young offenders under the age of twenty-one out of prison; and (b) to ensure that such offenders can be given the amount and type of training best suited to their needs, and most likely to direct them from crime.

The principal proposals for implementing these objects are: that a system of detention centres should be developed to the point at which it could replace short term imprisonment (under six months) for young offenders; that the principle of the indeterminate sentence, which already exists in the borstal sentence, should be extended to all young offenders for whom a court considers that a period of detention between six months and two years is required; and that the courts should be prohibited from sending young offenders to imprisonment unless they consider a sentence of at least three years to be appropriate.

It has for some time been recognised that short terms of imprisonment for young offenders are more likely to do harm than good. The replacement of these by a standard period of three or six months' training in a detention centre is a welcome one, particularly as the Council recommend that all periods of detention in a detention centre should be followed by a period of statutory after-care of up to one year from the date of release.

We regret, however, that the Council have recommended that imprisonment for less than six months should be retained as coercive (rather than punitive) treatment for youths failing to pay either a fine or a debt. A more satisfactory way of dealing with this problem lies, surely, in some system of attachment of wages.

The idea behind the indeterminate sentence is that it will be possible for the Prison Commissioners to decide under what conditions and in which establishment, and how long that training should last. This system has much to recommend it, since it is rarely possible for the courts to know enough about a young offender's background and temperament to know which of the types of sentence (imprisonment or borstal training) is most likely to turn the offender from crime. It is also considered that better use could be made of the facilities already available if the training of young offenders is wholly in the hands of the Prison Commissioners. Again, a period of statutory after-care on release is recommended, this time a period of up to two years.

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[3] Cmnd. 645.

The recommended changes offer a greater flexibility in dealing with persistent offenders. It is believed that the new standard sentences of detention will have a greater deterrent value than periods of imprisonment less than six months, as, while living conditions in detention centres may be better than those in prison, the régime will be more exacting. It is also thought that the indeterminate nature of longer sentences of custodial training will be, in itself, a deterrent factor.

For the success of the scheme much will depend on the staff of our prisons and training centres. We feel very strongly that much more could be done to attract more men and women of high calibre to careers in the prison service. As things stand, serious understaffing may make it difficult to implement the recommendations outlined above, for they call for a considerable amount of attention to individual cases.

The Council also recommend that similar changes in the penal treatment of girls and young women should be introduced. They also say that they hope that everything possible will be done to ensure that a sufficient number of remand centres is made available in the near future; otherwise, the new methods will have less chance of success.

We hope that the implementation of these recommendations will be successful in turning the tide of crime among young people.

The Howard League

The Annual Report of the Howard League for Penal Reform contains the evidence given by the League to the Inter-Departmental Committee which, under the chairmanship of Streatfeild J., is considering the present arrangements for bringing prisoners to trial and providing the courts with information to help them in sentencing offenders.

The League recommend a much more thorough diagnostic examination of the personality and background of offenders, to be carried out in the special Remand and Observation Centres envisaged by the Criminal Justice Act, 1948, rather than by overworked and untrained prison officials.

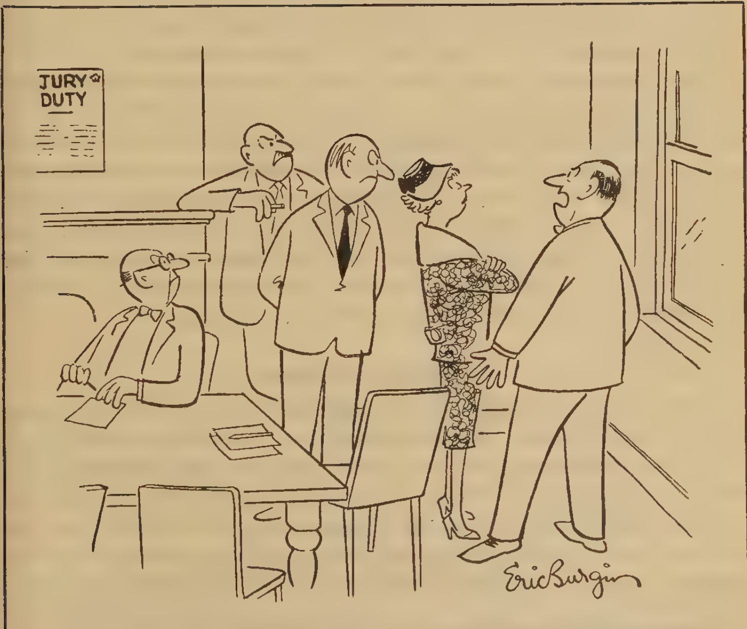
They also recommend an increase in the number of Crown Courts like those in Liverpool and Manchester. They envisage a system covering the whole country, with one Crown Court to every three million inhabitants, and gradually replacing the Assize Courts and some courts of quarter sessions.

The League also propose that some system of training the judiciary in criminology, psychology, penology and sociology be found.

The fourth recommendation is that effort should be made to achieve similarity in sentencing where there is similarity of circumstances, for example by requiring reasons in writing for sentences of three years' imprisonment or more.

Judicial appointments

Sir Anthony Hawke has been elected Recorder of London in succession to Sir Gerald Dodson, who is retiring on November 16.



"We know what he said! but he didn't mean you couldn't discuss the case with US!"

Misprisions, Compoundings and Compromises

By C. HOWARD, LL.M.
Lecturer in Law in the University of Queensland

Introduction

It was difficult to think of a title for this article which gave a fair indication of its contents. The original idea was to discover how far a private criminal prosecution could be compromised by the parties before verdict. Then it seemed desirable to include a preliminary account of misprision of felony and compounding,[1] upon which the general rule that it is illegal to compromise a prosecution depends. At the other end, the discussion was found to be incomplete without a reference to the bars to subsequent civil proceedings set up by some private prosecutions, and to the effect of withdrawing a prosecution upon subsequent criminal proceedings in the same court. It is hoped that in the result a useful purpose will have been served by bringing together a variety of rules otherwise to be found only in scattered isolation.

The discussion starts, then, with misprision of felony and compounding. There follows an examination of the law as to compromising prosecutions, leading to the conclusion that although only private prosecutions for assault can certainly be compromised, similar prosecutions for a small number of other minor offences may also be susceptible of private settlement. These other minor offences, it is suggested, consist only of those a prosecution for which sets up a bar to a subsequent action for damages. Finally, the effect of withdrawing a prosecution is examined.

Misprision of felony

This crime is notable for its vagueness.[2] A short description might run as follows: misprision of felony is the misdemeanour of failing to communicate to the proper authority one's knowledge of the commission of a felony; but this apparently simple statement bristles with uncertainties. In a Canadian case in 1955 there was felt to be sufficient uncertainty about the very existence of the offence at the present day to require that the benefit of the doubt be given to the accused.[3] In England it seems still to be conceded that there is such an offence, but judicial uncertainty has been expressed as to its constituents.[4] Before examining the present state of misprision of felony at common law, a statutory offence may be noticed. Under the Sheriffs Act, 1887, s. 29 (1),[5] any " sheriff, under-sheriff, bailiff, or officer of a sheriff " who " conceals or procures the concealment of any felon ; or . . . refuses to arrest any felon in his bailiwick " commits a misdemeanour for which he is liable to imprisonment for not more than one year and a fine, or, if he is too impecunious to pay a fine, to imprisonment for not more than three years. Members of the public at large who do likewise are liable to imprisonment at the court's discretion, or to a fine, or to both. Section 8 (1) imposes a general duty to assist the public officers to arrest felons.

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[1] Conspiracy has been omitted as straying too far from the original purpose.

[2] Thus, Stephen, *Digest* (1887), p. 372: "The definition of misprision of felony is extremely vague."

The offence at common law is a misdemeanour punishable with fine and imprisonment.[6] It is distinguishable from the greater offence of misprision of treason [7] and applies to concealment of both common law and statutory felonies.[8] Although an accessory after the fact to a felony is always guilty of misprision,[9] the converse is not true. To become a party to felony after the fact one must render the felon some positive assistance with a view to shielding him from justice,[10] whereas misprision is constituted by mere omission to disclose knowledge.[11] At this point an inquiry is suggested by the wording of the Sheriffs Act. The sections quoted advert to concealing, not a felony, but a felon. Is it misprision merely to conceal one's knowledge that a felony has been committed, or must one in addition know who committed it? If a woman is raped and, being unable to identify her assailant, because she was drugged at the time, decides to keep the distressing affair to herself, does she thereby commit a crime? Coke uses language suggesting that concealment of the mere fact of the felony is a misprision, but gives as an example the case where one witnesses a homicide and refrains from apprehending the killer.[12] Later commentators copied his words, although not his example. The clearest statement is given by Chitty[13]: "Thus, in cases of treason and felony, any person knowing the crime to have been committed and concealing it, even though he has not actively assisted the offender, will be guilty of a misprision of the crime which he has been instrumental in concealing. . . . In all cases, therefore, when a capital offence[14] has been committed, it is the absolute duty and only safe conduct of the party who is aware of the circumstance, to reveal it as soon as possible to some judge of assize, or justice of the peace." He precedes this by a statement of the moral duty one has to society to facilitate the prosecution of crimes: "The object of criminal provisions is not vengeance for the past, but safety for the future; and to the furtherance of this design every man is bound to contribute."[15] Such statements seem to point to concealment of the offence rather than the offender being the crime.

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[3] *Semenick* (1955) 15 W.W.R.(N.S.) 333. The appellant had refused to reveal to the police the name of a person who had attempted to murder him. For this he was convicted of misprision of felony. The conviction was quashed on appeal. For a contrary Australian view, see [1955] Crim.L.R. 291.

[4] *Aberg* [1948] 1 All E.R. 601.

[5] 50 & 51 Vict. c. 55. *Cf.* Road Traffic Act, 1930, s. 22.

[6] 3 Co.Inst. 134.

[7] 3 Co.Inst. 36; 1 Hale P.C. 374; 4 Bl.Comm. 120; 1 East P.C. 139.

[8] 3 Co.Inst. 139; 1 Hale P.C. 375; 1 Hawk.P.C. c. 7, s. 2.

[9] 3 Co.Inst. 36, 140; 1 Hale P.C. 374; 4 Bl.Comm. 120.

[10] Glanville Williams, *Criminal Law: The General Part*, p. 225.

[11] The older authorities distinguish between passive and active misprision, but used in the latter sense the word merely means misdemeanour. See 3 Co.Inst. 139.

But there are contrary indications. First, there is Coke's example. It is difficult to see how one could be expected to arrest a killer unless one knew, in some sense, who he was. Again, in his passage on theft-bote, that form of compounding a felony which consists in agreeing with a thief not to prosecute him if he will return one's goods, Coke adds[16]: "But if a man take his goods again that were stollen, it is no offence, unlesse he favour the thief, as is aforesaid." This seems to imply that one does not commit an offence unless one is at least aware of the identity of the felon. These, however, are slender threads upon which to hang an argument. Coke's example is faulty anyway, for the offence consists in failing to inform, not in failing to arrest; and the words "it is no offence" in the theft-bote passage may well mean no more than "it is not the offence of theft-bote." The older books being inconclusive,[17] one turns to more modern authority. One is not embarrassed by it. There are dicta in *Williams* v. *Bayley*[18] and *Aberg*,[19] there are the Canadian and Australian decisions referred to above,[20] which come to opposite conclusions, and that is all.

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[12] 3 Co.Inst. 139.

[13] *Criminal Law*, pp. 3, 4.

[14] *i.e.*, treason or felony.

[15] *Op. cit.*, p. 3. But if this is so, why is there no crime of misprision of misdemeanour?

[16] 3 Co.Inst. 134.

[17] In the words of Professor Norval Morris, "an antique fog": [1955] Crim.L.R. 291.

[18] (1866) L.R. 1 H.L. 200.

[19] [1948] 1 All E.R. 601.

[20] Above, n. 3.

Williams v. *Bayley*, it will be recalled, was the well-known case where bankers induced a father to enter into a financial arrangement by implying that they would prosecute his son for forgery if he did not. The decision that the agreement was unenforceable proceeded chiefly on the ground that unfair pressure had been brought to bear upon the father by the bankers, for which reason the case is more usually met with in books on equity. However, there was some discussion of the law relating to compounding and misprision. Lord Westbury had this to say[21]: " Now, such being the nature of the transaction, my Lords, I apprehend the law to be this, and unquestionably it is a law dictated by the soundest considerations of policy and morality, that you shall not make a trade of a felony. If you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself. . . . If men were permitted to trade upon the knowledge of a crime, and to convert their privity to that crime into an occasion of advantage, no doubt a great legal and a great moral offence would be committed. And that is what, I apprehend, the old rule of law intended to convey when it embodied the principle under words which have now somewhat passed into desuetude, namely, ' misprision of felony.' That was a case when a man, instead of performing his public duty, and giving information to the public authorities of a crime that he was aware of, concealed his knowledge, and farther, converted it into a source of emolument to himself." The scarcity of modern authority warrants a closer examination of this dictum than might otherwise be the case.

In the first place, Lord Westbury may have been confusing misprision and the kindred offence of compounding. It was not clear in 1866 that benefit to the defendant was an element of misprision. There is no trace of such a requirement in the institutional writers. Lord Goddard took up the suggestion in *Aberg*,[22] but contented himself with remarking, *à propos* any future cases, " It may be that the court will have carefully to consider whether it is necessary to show a concealment for the benefit of the person charged." *Williams* v. *Bayley* was the only authority he referred to on the point. However, in the New South Wales case of *Hosking*,[23] Stephen J. not only held that a " material gain, benefit or emolument " to the defendant was an element of the offence at the present day, but directed an acquittal for lack of that very element. It seems probable that what may have started as a confusion in Lord Westbury's mind has become a rule of law.

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[21] (1866) L.R. 1 H.L. 220–221.

[22] [1948] 1 All E.R. 601.

[23] [1955] Crim.L.R. 291.

The next observation to be made on Lord Westbury's remarks is that although in terms he refers to knowledge of a felony, he clearly had in mind the case where one is in a position to make a profit out of the felon, and therefore knew the identity of the offender. The question whether the offence consists in concealing the crime or the criminal therefore remains unanswered. It is strange that nowhere in the authorities is the point even so much as mentioned. It might be argued that if the criminal law is going to impose a liability wider than that of the accessory after the fact, there is little point in limiting this liability by reference to the offender rather than the offence. If law enforcement is thought to be materially assisted by the imposition of a duty to report one's knowledge of infractions of the criminal law,[24] then nothing is to be gained by confining that duty to cases where one knows also who committed the infraction. As Professor Morris remarks,[25] this is "a period of decreasing regard for the criminal law and lesser support for the police," and "the repression of crime is a community responsibility." On the other hand, there can be little doubt that the inclination of an English court would be to restrict the scope of the offence. The importation of the requirement that there be some benefit to the defendant is an indication of this. Moreover, the scope of misprision, if the traditional statements are taken literally, is absurd, extending to the most trivial thefts, even if committed by children.[26] There is the further consideration [27] that under many circumstances it may be undesirable to report the commission of an offence. In 1840 the Criminal Law Commissioners suggested that if misprision is to be retained, it be limited to the more serious crimes. This is an improvement on limiting it to cases where one knows the identity of a felon, but involves too big a change in the law to be brought about by decided cases alone. Nevertheless, considerations such as these support the suggestion that at the present day the courts will tend to limit the scope of the offence in any way which presents itself, including confining it to the case where one is in a position to inform the police of the identity of the offender.

The difference between misprision and compounding is less than it used to be. Formerly it would have been possible to say that misprision did not require any benefit to the defendant, whereas compounding was an agreement for reward, but this ground of distinction has now gone.[28] There remain two others. First, agreement is essential to compounding, whereas there need be no agreement in misprision.[29] For example, A, a rich bachelor, dies intestate. B, a close friend of his, forges a will by A leaving his estate to B and C, another close friend whom B has included in the will to increase its appearance of veracity. C knows nothing of the felonious[30] forgery, but after the spurious will is admitted to probate discovers the true facts by accident. He decides, without consulting B, to keep his knowledge to himself in order to benefit under the "will." C has committed misprision but not compounding. The second remaining distinction between misprision and compounding is that one cannot compound a felony that has not yet been committed, whereas misprision of felony includes omitting to reveal one's knowledge that a felony is to be committed.[31]

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[24] Judging by the paucity of prosecutions for misprision, this view may not be widely held.

[25] [1955] Crim.L.R. 293.

[26] See Williams, *op. cit.*, p. 236.

[27] Clearly expressed by the Criminal Law Commissioners in 1840: see *ibid.*

An interesting question is the extent of liability for misprision after the felon's death. In most cases there will be no difficulty because the requirement of material benefit to the accused will insure that some other crime has also been committed. Thus, if in the example of the forged will C does not discover the facts until after B's death, he will be criminally liable for his fraudulent conversion of A's property whatever his liability for misprision. But an example can be imagined which is less easily disposed of. Suppose D, a girl in moderate circumstances, is engaged to marry a wealthy man with strict views on the chastity of brides. She is raped on a lonely clifftop by a local youth whom she recognises. In making his escape her assailant falls over the cliff and is killed. Knowing that if her fiancé discovers the truth he will feel obliged to break off the engagement, she conceals her knowledge, and the coroner's jury later return an unremarkable verdict of accidental death. All the elements of misprision are present,[32] but it is scarcely credible that a prosecution would follow discovery of D's concealment. Yet the public interest is not necessarily best served by her silence. If there had been a number of rapes in the neighbourhood, the information D could give to the police might be very important. It is easy to say that the theoretical scope of misprision is absurd. It is quite another matter to say where the line should be drawn.

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[28] In *Aberg* Lord Goddard referred only to "benefit," not to "material benefit," but it is submitted that material benefit is what is required: see *Hosking*, above, and consider the whole tenor of Lord Westbury's remarks in *Williams* v. *Bayley*.

[29] Dr. Williams, *op. cit.*, p. 237, appears to have overlooked this distinction.

[30] Forgery Act, 1913, s. 2.

[31] 2 Hawk.P.C. c. 29, s. 23. There was an offence of refraining from preventing a felony but this is now obsolete: Williams, *op. cit.*, p. 235.

[32] It is no answer to the material benefit point to say that if the engagement is broken off D has a remedy in damages. Few are so wedded to the law as to maintain that an action for damages is as good as a marriage.

More recently, the Australian case of *Crimmins*[33] has been heard. Crimmins was shot in the side in a fracas in Melbourne and attended hospital for treatment. The police heard of the matter and questioned Crimmins on how he came by the wound. He admitted that he had been deliberately shot, that he knew who had shot him, and that he knew where the incident had taken place, but refused to reveal his knowledge. He was tried before a jury for misprision of felony and convicted. The Full Court of the Supreme Court of Victoria, on a reservation of questions of law by the trial judge, O'Bryan J., unanimously upheld the conviction.

In his charge to the jury O'Bryan J. said[34]: "[Misprision] consists, broadly speaking, in concealing a felony when you know a felony has been committed. There are three things which the Crown has to establish to your satisfaction in order that you may bring in a verdict of guilty. The first thing is that you have to be satisfied that a felony was in fact committed by somebody. The next thing you have to be satisfied of is that he, the prisoner, knew that a felony had been committed. The third thing is that he, knowing that a felony had been committed, concealed the facts in relation thereto." He went on to explain these three requirements, saying of the third[34]: "In saying that he concealed the felony, I have to tell you . . . that although in one sense this man did not conceal the felony, it is sufficient for the purposes of this crime if he conceals the identity of the person who committed the crime, he knowing who the person was. It is also said that he concealed it inasmuch as he concealed the place where it was committed, and the result of that would be to impede the police investigation of this matter, because they would be unable to go to the place where it was committed to perhaps collect other information about the matter."

Reserving the correctness of his charge to the jury for review by the Full Court, O'Bryan J., indicated that he regarded as particularly difficult the questions (1) whether the Crown had to prove a benefit to the defendant from the concealment, and (2) whether concealment of the identity of the felon and of the place of commission of the offence were sufficient to constitute misprision.

On the first of these points the Full Court,[35] after reviewing the English authorities and books, had no doubt that benefit to the defendant was not, and never had been, an element of the offence.

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[33] [1959] V.R. 270.

[34] *Ibid.*, 271.

[35] Herring C.J., O'Bryan and Dean JJ.

The only support for the contrary view consisted of Lord Westbury's celebrated dictum in *Williams* v. *Bayley*[36] and the New South Wales case of *Hosking*.[37] As to Lord Westbury, the court concluded that he was wrong because he had founded his remarks on a confusion between misprision and compounding. *Hosking* received no more than a mention. On the second point it was held that the duty to disclose a felony is broken by failure to make known to the authorities facts that might lead to the apprehension of the felon. The identity of the felon and knowledge of the place where the offence was committed were clearly facts of this description, but the opportunity was not taken to indicate how far this doctrine might be carried. Presumably the police are the best judges of what makes a fact which may lead to an arrest. A question might arise one day as to how insignificant a fact must be to avoid giving rise to misprision if concealed.

The effect of *Crimmins* remains to be seen. In view of the general uncertainty about misprision, its persuasive authority must be great. Whether it will be followed in England depends on whether the Court of Criminal Appeal thinks it desirable to resuscitate this vague and ancient offence in the middle of the twentieth century. If so, *Crimmins* points the way; if not, there is always *Williams* v. *Bayley and Aberg*.[38]

Compounding

Compounding is the common law misdemeanour, punishable with fine and imprisonment, of agreeing for reward not to prosecute someone who has committed an offence. It extends to all felonies,[39] although in the early days it was particularly associated with theft, in the form of recovering one's goods from the thief by promising not to prosecute him.[40] The heart of the offence is the agreement[41]: it is not unlawful merely to accept one's goods back from the thief without any agreement not to prosecute,[42] although silence thereafter would constitute misprision of felony, and might be evidence from which an agreement could be inferred. The books speak [43] of any "favour" being shown to the thief and do not in so many words refer to an agreement not to prosecute. It is possible to imagine an agreement not to inform on the thief (or other felon), as opposed to an agreement to refrain from actually prosecuting him. The word "favour" may be taken as an indication that the scope of the offence is wide enough to include an agreement to do anything which will hinder or prevent the offender being brought to justice. The difference between a compounder and an accessory after is that the former makes an agreement but the latter actually does something. An accessory after does not compound a felony unless he agrees for reward to help the offender, and a compounder does not become an accessory after unless he actively helps the offender to elude justice.[44]

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[36] (1866) L.R. 1 H.L. 200, 220.

[37] Apparently reported only in [1955] Crim.L.R. 291.

[38] [1948] 2 K.B. 173.

[39] 3 Co.Inst. 133–134; 1 Hawk.P.C. c. 7, s. 5; 1 Hale P.C. 546 and 619; *Burgess* (1885) 16 Q.B.D. 141.

[40] "Theft-bote": 3 Co.Inst. 134; 1 Hawk.P.C. c. 7, ss. 5 and 7; 1 Hale P.C. 546 and 619, and see his note on p. 546: "And so seems the practice of advertising a reward for bringing goods stolen, and no questions asked, which I have heard Lord Chancellor Macclesfield declare to be highly criminal, as being a sort of compounding of felony, for the goods by that means returning to the right owner, a stop is put to the inquiry and prosecution of the felon, and thereby great encouragement is given to the commission of such offences."

[41] The offence is complete when the agreement is made: *Burgess* (1885) 16 Q.B.D. 141. Hence, it is immaterial that the "felon" was later acquitted: *Ex p. Brooks* (1822) 1 Bing. 105.

Closely allied to compounding a felony are the statutory offences of taking rewards and advertising. By section 34 of the Larceny Act, 1916, it is a felony "corruptly" to take a reward for helping anyone to recover property which has been stolen or obtained by false pretences.[45] Under section 102 of the Larceny Act, 1861,[46] anyone who advertises for the return of lost or stolen property in a manner indicating that no questions will be asked, "shall forfeit the sum of fifty pounds."

It is not clear whether compounding a misdemeanour is an offence at common law. The point is not of much importance, because it is now settled that most agreements to stifle a prosecution for misdemeanour are illegal so far as the civil law is concerned,[47] and in the criminal law the ground is covered by conspiracy and the miscellaneous misdemeanours of interfering with the course of justice.[48] It seems never to have been the law that agreeing for reward not to prosecute a felony still in contemplation amounted to compounding. Here the ground is covered by misprision, but the consequence is that in the absence of conspiracy, one cannot be convicted for failing to reveal to the authorities one's knowledge of a misdemeanour about to be committed.

[*To be continued*]

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[42] 3 Co.Inst. 134; 1 Hawk.P.C. c. 7, s. 7; 1 Hale P.C. 546 and 619.
[43] See n. 42, *above*.
[44] 1 Hale P.C. 371 and 618.
[45] It is to be observed that obtaining is itself only a misdemeanour.
[46] See also n. 2, above.
[47] See below.
[48] See on these, Williams, *op. cit.*, pp. 230–235.

Prosecuting Officer

By Christopher Williams

Newman in court

"Sir," said Sergeant Green in what he doubtless considered a discreet whisper, but which nevertheless rasped across the table to where Inspector Newman was checking his papers in readiness for the morning's court. "Mr. Pobjoy, who's appearing for Collins, in the dangerous driving case, has just been having a word with me. He says they'll plead guilty to careless driving and failing to halt, if we drop the dangerous driving. If not they'll be going for trial—or so he says."

"Mr. Pobjoy, Sergeant?" queried Newman, glancing along the table, around which three or four solicitors and probation officers sat talking idly to one another—rather like spiritualists, thought Newman, waiting for the table-rapping to begin. "Which is he?"

"Heavy gentleman at the end there, with the ribbon round his neck, sir," replied Green. "Look, he's coming round—I should watch out if I were you, sir."

"Ah, my dear Inspector," boomed Pobjoy, as he plumped himself into the empty chair beside Newman. "Haven't yet had the pleasure—the name's Pobjoy, of Wriggle and Knot, you know, in the Bull Market here. You're new here, I believe—let me welcome you to Smallport." He extended a large damp hand, which engulfed Newman's like a mist. His voice dropped to a confidential murmur, "Now as to this unfortunate business of my client's—Wilfred Collins, I mean. I expect our good friend the Sergeant here has told you what I feel is the best course to pursue. I was sure you'd agree. Nothing much in it, after all. In fact, I was rather surprised your people thought it worth while to bother him with it. I've known him for years—most careful fellow. Still, since you have dragged him up here, there's not much point in making a mountain out of a mole-hill. He's got a good case, mind you, but to save us all a lot of bother, why don't we just go ahead on the careless driving and the halt sign, and forget all about this dangerous driving, eh?"

Pobjoy's rather small eyes gleamed through the half-lenses perched on the broad bridge of his full nose. A broad black ribbon drooped gracefully downwards towards a prosperous looking fawn vest. But for his eyes, thought Newman, I'd think Pobjoy was a jovial old gent. Still, no point in upsetting him.

"Well, Mr. Pobjoy," he replied, "the trouble is that I don't really see how I can do that. These things are decided by my superiors, and no doubt they had their reasons. You know, I think we'll have to leave it to the Bench to see what they make of it."

"Ah, my dear fellow," replied Pobjoy mellifluously. "Of course, of course—just thought I'd save you a lot of trouble. Looks like being a long day for you here today; but still, never mind, never mind." And back he shuffled, nodding and smiling. Smiling, that was, all but his eyes, thought Newman.

"Friendly enough, don't you think, Green?" asked Newman, as Green sat down in the chair vacated by Pobjoy.

"Oh, very, sir," replied Green, lowering one leathery eyelid slightly. "And perhaps he won't be going for trial either, sir," he went on. "He will have his little joke. All the same, sir. . . ."

But Green's advice was never uttered, for at that moment the Clerk bustled into court, and business began.

In due course, the name of Collins was called. Newman looked up as a small, rather sly man rose from his seat in the public part of the court and made his way to the front of the dock. The clerk went smoothly through the preliminaries, which resulted in an application by Inspector Newman for summary trial, and an election by Collins to the same effect, and a plea of not guilty to each charge. Sergeant Green coughed delicately as his eyes caught the Inspector's. Newman rose to his feet.

"Witnesses out of court, please," he said, and paused while two wiry loking young men and a solid uniformed constable made their way through the swing doors.

Opening the case

"This prosecution, your worships," began Newman, "arose from a collision in which the defendant, Collins, became involved one Sunday evening some four weeks ago, when he was returning to his home in Wolverley after a day at the seaside resort of Sandbay some thirty miles away. The road from Sandbay which he was following is a minor road, until it joins the main road from Smallport to Wolverley at a 'T' junction some eight miles from both Sandbay and Smallport. As one approaches this junction from Sandbay, there is a 'Halt—Major Road Ahead' sign correctly placed in the Sandbay road, with a white line in the carriageway at the junction itself. So that, driving as the defendant was, one must halt before entering the main Smallport to Wolverley road, Smallport being then to one's left, and Wolverley to one's right."

Here the Chairman and his colleagues all nodded. "We all know the junction well, Inspector," said the Chairman. "Pray continue."

"The defendant, then, was driving his Austin saloon motor-car from Sandbay, towards this junction, at about half past six in the evening. His wife was sitting beside him, in the front passenger seat. As he approached the junction, two young men were riding their cycles along the main road from Smallport towards Wolverley, and were also approaching the junction. They were, of course, travelling from Collins' left to his right as he approached the main road. Instead of halting at the white line as he should have done, the defendant, we allege, drove straight out of the minor road on to the main road, and swung round to his right, towards Wolverley. The cyclists will both tell you that he did not stop, and that he seemed to ignore their presence until too late, when he swerved more sharply to his right, accelerating as he did so, in such a manner that the rear of his car developed a skid to the left and struck the leading cyclist, knocking him from his machine. The defendant's car continued to slide round to its left, until its near-side wheels struck the concrete kerb and the car overturned, throwing the defendant's wife out and injuring her. The second cyclist telephoned for help from a nearby call-box, as a result of which a police officer arrived and took particulars, and an ambulance arrived and removed the defendant's wife to hospital, where she was treated. The officer took measurements, returning the following day to take photographs. When asked by this officer how the accident had happened, the defendant offered an explanation, about which the officer will be telling you later.

Newman paused, as he noticed Pobjoy jerk round and whisper to Collins, who was vigorously shaking his head. Pobjoy turned back, and caught Newman's glance. Not even his mouth smiled this time. The Inspector went on: "It is the contention of the prosecution that the defendant, in driving out of the side road without halting, acted in a dangerous manner, having regard not only to the traffic that might have been expected but also to what actually was on the road; and that he failed to display due care. I will now call the first witness, the leading cyclist. Mr. Turner, please."

Prosecution witnesses

Mr. Turner appeared and was led into the witness-box, where he proceeded to announce himself as a clerk, aged twenty-six. Then he gave his evidence precisely and with little prompting. From this evidence it was plain that the car had shot straight out of the side road without stopping, and had got out of control as it turned right, knocking the witness from his machine. He had been too dazed to notice anything more until after the arrival of the police officer, but remembered thinking that it was a dangerous way of driving, to turn on to a main road like that. Newman could think of nothing else to ask the witness, so he sat down. Pobjoy rose to his feet.

" Well, now, Mr. Turner," he said blandly. " Tell me, do you do a great deal of cycling? "

" Yes, a very great deal, especially in the summer," replied Turner.

" And so I suppose you are thoroughly experienced in modern traffic conditions? " asked Pobjoy.

" Yes, I see a great deal of it," answered Turner.

" Now, tell me, Mr. Turner," asked Pobjoy, " what do you, as a cyclist, think of the traffic these days? "

" Well," replied Turner, " there's a lot more of it every year."

" And, as a cyclist," continued Pobjoy, " what do you think of its manners, eh? Is it generally well behaved, eh? What, for instance, is your opinion of the average motorist, now? " Pobjoy beamed benevolence. But for his bulk, thought Newman, one might have said that he spoke as one wheeler to another. But what on earth had Turner's private opinion on traffic in general got to do with the case, he mused. Surely it was irrelevant. He shifted uneasily in his chair, until Sergeant Green caught his eye. Green's face was impassive, but one leathery lid dropped momentarily. Newman settled back in his chair.

" Well, of course," replied Turner, " there are plenty of bad drivers, and plenty of accidents."

" And, naturally, as a cyclist who has also been a victim of an accident, you no doubt feel that you are in a special position to judge, eh ? " smirked Pobjoy.

" I'm afraid I don't quite follow," said Turner.

Pobjoy's manner became stern. He levelled his glasses at the witness in a menacing gesture. " Well, I shall try to make it clearer to you, then. I put it to you that you look at these things as a cyclist; and that any unfortunate motorist into whose path you wobble is bound to be at fault in your view, because you take the cyclist's view that all motorists are dangerous animals; that you are biased against motorists as a class; that you condemn them out of hand. Tell me, isn't this the case ? "

" No," came the firm reply. " I didn't judge Mr. Collins from the point of view of a cyclist. I judged him from the point of view of a motorist of some nine years' experience, and of a member of the Institute of Advanced Motoring. I know dangerous driving when I see it."

Pobjoy sat down. Green leaned towards Newman and whispered: "Came to court in his car—I spotted the badge."

"Then you should have told me—there's nothing about that here," returned Newman as severely as a whisper allowed, tapping the file.

"Never gave it a thought till his nibs started on him, sir," replied Green apologetically.

Newman got up and called the name of the next witness, the second cyclist, Mr. Walker, who duly appeared and gave his story. It was not significantly different from Turner's, except that he hadn't had such a good view of Collins' car until it was well out into the main road, as he was a few yards behind his companion, and his view had been slightly obscured by a hedge at the corner. But he did see the car begin to skid, strike Turner's cycle and finally overturn.

Newman glanced down at his notes as Walker's tale came to an end. That seemed to be everything, he said to himself. All the same, he felt oddly uneasy. Something nagged vaguely at his mind, something he'd missed out. Rapidly he ran through the elements of the offence in his mind—car, halt sign, failure to stop, road, danger, traffic, the lot. What was missing? He was on the point of sitting down, when he noticed a look of eagerness on Pobjoy's face. Suddenly he remembered—the driver. He recalled the case he'd heard of only the other day, in which the prosecution, in a perfectly clear case, had done everything but prove that the man in front of the dock had been the driver; as soon as the case for the prosecution had ended, the defending solicitor had leapt to his feet and submitted that there was no case for his client to answer, because he had not been proved to be the driver; the court had had to accept the submission, properly refusing to allow the prosecution to re-open their case.

"Mr. Walker," he asked, "when you saw the car coming out of the side road, who was driving?"

"Why, Mr. Collins, of course," replied Walker with a puzzled frown.

"Do you see him in court today?" asked Newman.

"Yes, over there," replied Walker, pointing to the defendant. Pobjoy's glasses glittered flintily in Newman's direction. Perhaps he was the solicitor in that other case, mused Newman. Anyway, even if I'd not got it out of Walker, the constable could have proved it, he thought; all the same, I won't forget *that* in a hurry. He sat down.

Pobjoy was on his feet, swinging his glasses at the end of their black silk ribbon.

"Do you know the road you were on well?" he asked.

"Very well," replied Walker.

"And do you know the road my client was on before he entered the main road?"

"Yes."

"You know, then, that there is a 'Halt' sign at the junction?"

"Of course. I often ride back that way."

"And can you swear that you always, without exception, obey the injunction to halt?"

"Naturally."

"And would I be right in saying, therefore, that you naturally feel resentment against my client for failing to halt, when you always do?"

"Not resentment, no, just astonishment."

Pobjoy left it there, and sat down. Newman rose to his feet.

"Why did you feel astonishment, Mr. Walker?" he asked.

"Well, because it's such a busy road, especially at weekends in the summer," answered Walker. "As a matter of fact, I would think anyone with any sense would stop there anyway, even if there wasn't a 'Halt' sign."

"Thank you, Mr. Walker," said Newman. "P.C. Fouracre, please."

Police evidence

P.C. Fouracre stepped into the box and took the oath. Quietly and unemotionally he told how he had received a wireless message to go to the junction, and how he found a car on its side, with Mrs. Collins on the grass verge, her face covered in blood, and the first cyclist in a dazed condition. After looking at Mrs. Collins and finding no bones broken, he had made her comfortable until the ambulance arrived, and then went over to Mr. Collins and the second cyclist, who were engaged in an argument.

"I said to Mr. Collins, 'How did it happen?' and he said to me . . ."

Here Pobjoy lumbered to his feet. "I must intervene here," he said. "The constable appears to be about to place before the court a statement made by my client, who is charged with a serious offence, without a caution having been administered. I submit that such a statement ought not to be received in evidence, as it would not be in accordance with the Judges' Rules."

The Clerk stood up and turned to consult with the Chairman.

After a few moments he sat down, and the Chairman addressed Newman.

" Before the Bench decides the point put forward by Mr. Pobjoy, we would like to hear what you may have to say, Inspector," he said.

" But before the Inspector favours us with his views," put in Pobjoy, " perhaps the officer might be allowed to withdraw from the court until the Inspector has finished."

The Clerk nodded, and P.C. Fouracre disappeared from view.

The Judges' Rules

" As I understand the position, your worships," began Newman, " any relevant statement by an accused person is admissible, provided that it was made voluntarily, or rather, provided that the prosecution establishes that it was made voluntarily. The Judges' Rules have no force of law, but merely amount to advice to police officers as to the best and most acceptable way of ensuring that any statement made by an accused person is made voluntarily, and can be shown to have been so made. There are, in addition, other rules about questioning prisoners and so on, but I don't think Mr. Pobjoy has these in mind. Now, if this view is right, it follows that statements made without the caution prescribed in the Rules having been administered are not automatically inadmissible merely because no caution was administered; if despite the omission they can be shown to have been made voluntarily, the court has discretion to accept them.

" But even if this is not the proper view, I cannot agree that the Judges' Rules are applicable in this case. I presume that Mr. Pobjoy has in mind Rule 2, which your worships will recall says that whenever a police officer has made up his mind to charge a person with a crime, he should first caution such person before asking him any questions, or any further questions, as the case may be. Leaving aside the question whether dangerous driving, careless driving or failing to halt can be called crimes for this purpose, the plain fact of the matter is that, at the time the defendant made the statement to the constable, the latter had not made up his mind to charge him. I'm sure he hadn't. He had only just arrived on the scene, and was collecting what facts he could, by asking the various parties what had happened. Indeed, if it comes to the Judges' Rules, Rule 1 says that when a police officer is trying to discover the author of a crime, there is no objection to his putting questions in respect thereof to any person, whether suspected or not, from whom he thinks useful information can be obtained. And that is just what the constable did to the defendant. Even if he had had some reason for suspecting the defendant, and I am not aware that he had at that stage, he was still entitled to ask him what happened without cautioning him, and to give his reply in evidence. There are surely three stages—first, open mind, questions allowed without caution; secondly, suspicion, questions still allowed without caution, and, thirdly, decision to charge, no questions without caution. And of course, there is a fourth stage, if you like—arrest, no questions at all; but that's not in issue here. Now I suggest that the constable was in the first stage, or at furthest the second. And so I submit that the court may safely hear his evidence about what the defendant said to him, despite the fact that no caution was administered. But, of course, if it proves that the constable had already made up his mind to charge the defendant, then perhaps a caution might have been appropriate. But even then, of course, not essential, provided the statement was made voluntarily; and no doubt the constable is in a position to prove that that was the case."

"Thank you, Inspector," said the Chairman. "Mr. Pobjoy?"

Pobjoy pursed his mouth, and then said: "A most interesting point of view, no doubt, but I do not think I need attempt to assist you further, except to suggest that we now see what *was* in the officer's mind."

"Very well. The Bench will retire," said the Chairman, as he gathered his flock and shepherded them into the privacy of the retiring room.

Newman glanced at the Clerk, but he was busy with law books. Pobjoy was conferring with his client. "Never heard that one before, sir," whispered Sergeant Green.

The Inspector looked thoughtful. "Nor have I, Sergeant," he replied. "But at first glance he might have something there. After all, there are some forces where they always caution both the parties in any road accident.

"A good way to keep the statements short and sweet, I should think," replied Green. "But as a way of finding out what happened, I don't know."

At this point the Clerk was summoned to the retiring room, and he disappeared, armed with his books. It was not long before he was back, however, closely followed by the Bench.

"The Bench feel," said the Chairman, "that the matter has been put most clearly and helpfully. But before we hear the officer tell us what the defendant said, we must hear a little more about the circumstances. If the constable had no more than suspicions against the defendant, then we will hear the statement; but if he had already made up his mind to charge him, then we would wish to be satisfied about whether the statement was made voluntarily."

"Let's have the constable back, Inspector," said the Clerk.

P.C. Fouracre puffed his way back into the box once again. If he was bewildered at the odd turn the proceedings had taken, he was too old a campaigner to show it. He waited, gazing attentively towards the Inspector.

"Now then, Fouracre," began Newman. "Before you tell us what the defendant said, just tell the court what was in your mind as you went up to him—what conclusions you had formed as to who may have been to blame for the collision."

"I had formed no conclusions, your worships," replied Fouracre. "All that I knew at that time was that there had been a collision, a car had been overturned, and a cyclist knocked over. A woman had been injured; one cyclist was dazed, while the other was talking to the car driver, as I took him to be. So I decided to find out what had happened, as soon as I had done what was possible for the injured woman. I asked the defendant first, merely because he happened to be nearest to me. I said to him, 'How did this happen, sir?' and he told me his version. Then I turned to the cyclist and said, 'What have you got to say, sir?' and he told me his version."

"That's enough for now, Fouracre," said Newman, looking towards the Clerk. The Clerk looked at Pobjoy, and Pobjoy looked at Fouracre.

"Come now, officer," began Pobjoy, "I want you to be very careful here. Remember, you're on oath. Do you really mean to tell the court that, with a car that had come out of a side turning and knocked over a cyclist on the main road, you did not at once leap to the conclusion that the motorist was at fault?"

"I did not know then where the motorist had come from, nor where the cyclist had come from either," replied Fouracre. "That was the very thing I was asking about."

Pobjoy sat down. Newman looked at the Clerk, who glanced up at the Chairman, who nodded.

"The officer may continue his evidence, Inspector," said the Clerk.

Fouracre stolidly started again, after a glance at his notebook. "I said to the defendant, 'How did this happen, sir?' and he replied: 'I came up to the junction quite slow but never saw the cyclist till he was almost on me. They're a confounded nuisance on this road at weekends. I put my foot down to try and get ahead of him, but skidded. The next thing I knew we were over.' I then turned to Mr. Walker, and asked him what happened."

The constable then told the court how Walker, and then Turner, who had by then recovered, had described the collision to him, and how he had then told Collins that the facts would be reported. Then he went on to tell of pointing out marks on the road to Collins, the removal of Collins and his wife to hospital, the departure of the cyclists, the taking of measurements and subsequently of photographs and the rest of it.

"Fouracre," asked Newman, as the constable's recital came to an end, "Where was the defendant when Mr. Walker was telling you his version?"

"Standing beside me, your worships," replied Fouracre.

"And when Mr. Turner was doing the same?"

"He was talking to his wife then; the ambulance was just coming up, your worships."

Newman looked at Pobjoy, who made a slight gesture with a plump hand, as much as to say, a trifle, my dear fellow, forget it. Maybe, thought Newman, but not one that'll happen again; teach me to leave well alone.

"When Mr. Walker had finished his story," asked Newman, "did the defendant say anything?"

"No," replied Fouracre.

"Did you say anything more to the defendant, Fouracre?" asked Newman.

"Yes, your worships," replied the constable. "I said to him: 'The facts will be reported.' He made no reply."

The Inspector sat down, and Pobjoy rose to his feet.

"Constable, you say you told my client that the facts would be reported," he began. "Is that all you said to him? You didn't say anything about warning him, or about dangerous or careless driving?"

"No, your worships," replied Fouracre.

"Why not?" asked Pobjoy.

"I didn't think it was necessary, your worships," answered the constable.

"Not necessary!" exclaimed Pobjoy, raising his eyebrows. "Then it seems as though you and your superiors differ in opinion about the seriousness of the case. I suppose you are aware that the law provides for an officer at the scene giving a verbal warning of prosecution—I think the police call it the 'warning formula.' I take it, then, that you did not think this was a case that merited prosecution, eh?"

"I never thought anything of the kind, your worships," replied

Fouracre imperturbably. "It's just that I felt it my duty to report the facts to my superiors, and they would take any action necessary."

"In other words, officer," rejoined Pobjoy, "this was a borderline case." He sat down. Newman glanced at the Clerk, who said: "You're rather putting words into the officer's mouth, aren't you, Mr. Pobjoy?"

Pobjoy remained silent, and Newman got to his feet.

"Fouracre," he began, "from the facts available to you at the time, had you formed any conclusions about the defendant's manner of driving?"

"Certainly, your worships," replied Fouracre. "I was quite satisfied that he had driven dangerously."

"Would you tell the court about the practice in the force in connection with giving the warning formula, to which reference has been made?" said Newman.

"The practice, your worships," replied Fouracre, "is for the officer on the spot not to give the warning formula verbally at the time, but for it to be sent in writing, by registered post, by a superior officer when he has considered the facts."

"Are there any occasions," continued Newman, "when it is the duty of the officer at the scene to give it verbally at the time?"

"When the officer actually witnesses the incident, he should give it," replied Fouracre. "Or when there is anything to suggest that the person to whom it should be given is not likely to receive a written notice—say, if he is apparently touring, or is going abroad, or in any of the services."

"And so why did you not give it in this case?" asked Newman.

"Because it did not fall into one of the cases I have mentioned, your worships. I knew it would be sent from the office," replied Fouracre.

Inspector Newman said: "That is the case, your worships."

The defence

Pobjoy got to his feet. "As you will by now have realised," he began, "this case is nothing like so strong as it might appear at first glance. The suggestion that my client drove dangerously really turns out to hang upon the allegation that he failed to halt at the junction. This suggestion comes from the cyclist who collided with my client's car, and if he had been paying as much attention to where he was going as he should, he could hardly have seen whether a slowly moving car pointing directly towards him from his right was moving or stationary. He collided with my client's car, and therefore the car must have come straight out—

that's what it amounts to. And because it didn't stop, therefore it was driving dangerously. Now you will notice that the prosecution have not considered it necessary—or perhaps I should say wise—even to attempt to call the one person who was in a position to confirm or refute what they allege—I refer to my client's wife. . . ."

" Are you calling her, Mr. Pobjoy? " broke in the Clerk.

" Alas, no ; her injuries . . ." began Pobjoy, with a placatory wave of his glasses.

" Are you calling any witness as to facts? " interrupted the Clerk.

" No, unfortunately . . ." began Pobjoy again.

" Are you calling the defendant, Mr. Pobjoy? " interrupted the Clerk again, with a patient expression on his face.

" Indeed, yes ; in fact I was on the point of doing so," replied Pobjoy. " Mr. Collins, pray step into the witness-box and take the oath."

Inspector Newman glanced at Sergeant Green, who shrugged his shoulders. I wonder what all that was about, thought Newman to himself.

The defendant

Collins was not an easy witness. Beaming encouragingly, Pobjoy induced him to release pellet after pellet of evidence towards the Bench. He had had his attention engaged, as he approached the junction from Sandbay, by parked cars ; a dog had run across the road ; the sun had suddenly appeared in an unfavourable position just as it emerged from a bank of clouds. All this led him to be still moving, very slowly, however, perhaps one or two miles an hour, when he actually arrived at the white line. Not being sure just how far behind him a following car was, he decided, purely in the interests of road safety, not to jam his brakes on, but to crawl out into the main road, after making sure there was nothing coming from the right. Suddenly the racing cycles swept into his view from the left. He prudently tried to accelerate to get past the leading cycle, but unhappily his rear wheels skidded on a patch of horse manure, and he slid to the left, with the unfortunate results already described. Nothing that he had done that evening could be remotely described as dangerous, or even careless ; on the contrary, he had been actuated by thoughts of caution and safety throughout. He was truly the victim of circumstances. He had been driving for some years.

At this point, a sudden thought entered Newman's head. Cursing himself for his forgetfulness, he quickly extracted a card from the file on the table in front of him and deftly slipped it into Pobjoy's hand. Pobjoy brought his gleaming lenses to bear on it, and, bowing almost imperceptibly at the Inspector, hurriedly addressed himself once more to his client.

"Never mind that just now; come back to the actual collision, Mr. Collins," he said, and proceeded to ask a few more questions. Then, changing the subject abruptly, he asked: "Now, about your wife. Are you aware of anything to suggest that she was not in a position to corroborate all you have told the court this morning?"

"No," replied Collins. "She was sitting in front beside me, and was watching all that went on. She'd tell you just what I've told you if she could have been here."

"How is she, then?" asked Pobjoy coaxingly.

"Not at all well, I'm afraid," replied Collins. "The accident, and going to hospital and all that, she's just not up to it."

Pobjoy resumed his seat, and Newman rose and said: "Did you go to the hospital with your wife?"

"Yes," replied Collins.

"How long did they keep her there?" asked Newman.

"About half an hour," mumbled Collins.

"Do you know what they did to her in the hospital?" asked Newman.

"They cleaned her cuts and put bandages on," replied Collins.

"Did they put any stitches in?" asked Newman.

"No, I've told you what they did," answered Collins. "But she was that shaken, she kept to her bed for days after."

"And when did her doctor last see her?" asked Newman.

Collins paused. "Two weeks ago today," he said finally.

Inspector Newman paused. Funny about Mrs. Collins, he thought; we never took a statement from her—I suppose she's not a competent witness against her husband, he reflected. But then why had Pobjoy tried to make a thing about the prosecution not calling her, and then try and make out she was more badly injured than she had been? And anyway, why hadn't *he* called her?—she's obviously fit to come to court. Suppose they know she'd let them down. Funny business altogether; must go into it afterwards, he mused. Anyway, if there was anything in her not being called, it cut both ways now. He turned to the next bit of business.

"Do you know these roads well?" he asked.

"Quite well, yes," replied Collins. "I use them both a lot at weekends."

"Do you know that traffic is usually quite heavy then, and that there are a large number of cyclists using the road from

Smallport? " Newman asked; no harm in leading questions while I'm cross-examining, he thought.

"Yes," replied Collins.

"You have told the court that you were dazzled by the sun as you came up to the junction, that a dog ran across the road, and that there was a car behind you. Did you tell the officer anything about all this when he asked you what happened? " asked Newman.

"No," replied Collins. "I was too dazed, and wanted to get back to my wife."

"One last question," said Newman. "Do you still say you were only travelling at one or two miles an hour when you crossed the white line? "

"Yes," replied Collins.

"But you did not halt?" asked Newman.

"No," replied Collins.

Newman sat down, and Collins left the box. Pobjoy rose to his feet. "As I was saying, it will have become evident that this case is much simpler than it seems at first glance. The whole thing rests on the alleged failure of my client to observe strictly the injunction to halt at the junction. You have heard the considerations which led my client, after an unlucky approach, to keep moving. So far from failing to exercise care, he was in fact doing just that—choosing between a possibly dangerous literal obedience to the halt sign, and a prudent disregard on the grounds of road safety. In the event, of course, as we now know, it turned out to be a wrong decision. It is unfortunate for my client that his wife, the best-placed witness of all, should not have been able to be here to support her husband's testimony today. However, if the court finds that the technical offence of failing to halt has in fact been committed, I am sure that my client is the last person to dispute their decision. But that is a very different thing from saying, as the prosecution are trying to say, that this error of judgment, for it is nothing more, amounts to careless driving, still less to dangerous driving. And so I do ask you to dismiss the first two charges out of hand; the third I am content to leave to your wisdom."

As soon as the Bench had retired, Newman leaned over to whisper to Green. "He seemed to change his mind about the wife. First it was peculiar we didn't call her; then it was a pity he couldn't."

"*Could* we have called her, sir?" asked Green. "Is she competent? "

"Well, as to that," began the Inspector, with some inward misgivings, "it's rather a complicated business. Normally, of course——"

But his explanations were cut short by the return of the Chairman, followed by his fellow magistrates.

"We find the defendant guilty of the first and the third charges, that is to say, guilty of dangerous driving and of failing to halt. Is anything known, Inspector?" said the Chairman.

Inspector Newman leaned over, and, with a smile of apology, took the card from in front of Pobjoy. "He was convicted at Scarborough Magistrates' Court on the twentieth of June last year of careless driving, and was fined £5, and at Bow Street Court on the third of January this year of causing obstruction with a motor-car, and fined £2," said the Inspector.

The Clerk looked at the defendant, and asked: "Do you dispute those convictions, Collins?"

Collins shook his head. After a brief consultation with his colleagues, the Chairman turned to Collins, and said: "You will have to learn to take proper care on the roads, and pay attention to what you are doing. You will pay £10 on the first charge, and £2 for the third. The second charge will be adjourned for one month. Next case will be heard at a quarter past two o'clock."

And that was that. As the court emptied, Pobjoy came up to Newman. "Well, Inspector," he boomed. "It has been a real pleasure to do business with you. I certainly hope we shall see something of each other on future occasions. And I hope you'll be happy in Smallport. Oh, by the way, there's one small point that interests me. Of course, I don't wish to pry into the higher secrets of your calling, but just *why* didn't you——"

But Newman was destined never to know what interested Pobjoy, for at that moment Sergeant Green appeared beside him. "Excuse me, sir," he broke in, embracing both the Inspector and Pobjoy in an apologetic glance—"Excuse me, sir, but the Superintendent would like to speak to you on the office 'phone."

"You'll have to excuse me, I'm afraid," said Newman, as he hurried out of the court in the wake of Sergeant Green.

"Ah, my dear fellow, don't give it a thought; some other time," boomed Pobjoy, with a gracious wave of his glasses, "some other time."

[*To be continued*]

Attempting to Procure

By PETER R. GLAZEBROOK, *Lecturer in Law at Exeter and Trinity Colleges, Oxford*

In *Miskell*,[1] Hilbery J. giving the judgment of the Courts-Martial Appeals Court said:

> "It is important to bear in mind that the question is not whether this invitation and meeting in the circumstances amounted to an attempt to commit an act of gross indecency. They could not be said to be that. The question is whether these acts of the appellant were an attempt to procure the commission of the offence. Applying the principle as stated was there on these facts an act sufficiently proximate to procuring the boy to commit the offence to amount to an attempt to procure?"

This distinction has earned the support of Professor Smith.[2] But is it well founded?

The answer, it is suggested, is that it is not. A man has not procured the commission of an offence until it is committed, and so in the present instance a man will not have procured the commission of an act of gross indecency with himself until he has committed an act of gross indecency.[3] How then can a man attempt to procure the commission of an act of gross indecency with himself, and not attempt to commit an act of gross indecency?

We are often misled by language. Here we are misled because the verb "to procure" can be used in two ways. When we say that a man procured another to do something for him, we often imagine that he has been involved in a course of conduct—though on reflection we realise that this is not necessary at all. But while he is involved in such a course of conduct we might say that "A is procuring B to do X for him." If, however, at the end of it all B has not done what A wanted, then A has not procured him to do it, he has in fact only attempted to procure him to do it. And so, if we say that "A was unsuccessful in procuring B to do X" we mean that "A has *not* procured B to do X." The posting, for instance, of a letter inviting the commission of an act of gross indecency between writer and the addressee is therefore just as remote, and just as proximate to the completed crime, the commission of an act of gross indecency between writer and addressee, as it is to be the *successful* procuring of the commission of that same act—the only procuring which will amount to the completed crime.

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[1] [1954] 1 W.L.R. 438; 37 Cr.App.R. 214.

[2] [1959] Crim.L.R. 215.

[3] *Cf. Mackenzie and Higginson* (1911) 75 J.P. 159, *per* Lord Alverstone C.J. at p. 160; 6 Cr.App.R. at p. 72.

This groundless distinction has entered the reports as a consequence of the long-standing misconstruction of section 11 of the Criminal Law Amendment Act, 1885, which reads:

> " Any male person who, in public or private, commits, or is a party to the commission of, or procures, or attempts to procure the commission by any male person of, any act of gross indecency with another male person shall be guilty of a misdemeanor. . . ."

The bad drafting of the section reflects its known legislative history. The phrase " or attempts to procure " is surplusage since all attempts to commit indictable offences are themselves offences, and it has accordingly been omitted in section 13 of the Sexual Offences Act, 1956, which replaces the old section 11. Section 13 reads:

> " It is an offence for a man to commit an act of gross indecency with another man, whether in public or private, or to be a party to the commission by a man of an act of gross indecency with another man, or to procure the commission by a man of an act of gross indecency with another man."

Both sections plainly envisage three cases:

(i) An act of gross indecency between the accused (A) and another man (B);
(ii) An act of gross indecency between two men (B + C) to the commission of which the accused (A) is a party;
(iii) An act of gross indecency between two men (B + C) which the accused (A) has procured, though he is not a party to its actual commission.

Now, if the last phrase of the section, " or to procure the commission . . . with another man " is applied not only to case (iii) but also to case (i) then it repeats in less simple language the first phrase which covers only case (i).

Nevertheless this is what the Court for Crown Cases Reserved did in *Jones* [4] without hearing argument and without giving their reasons. Since the accused there had been charged and convicted of committing an act of gross indecency with B on an earlier count on the same facts, the matter was of little consequence to him. It can hardly be, however, that the very same act will support two counts of an indictment framed under the same section which is alternatively worded, and thus permit the passing of two consecutive sentences.

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[4] [1896] 1 Q.B. 4.

In *Cope* [5] the appellant had been charged and convicted of attempting to procure the commission of an act of gross indecency with himself. Counsel took the point that the third part of section 11 did not create such an offence, but the argument was summarily rejected by the Court of Criminal Appeal. Lord Trevethin C.J. said: "The opposite was decided by the Court for Crown Cases Reserved in *R.* v. *Jones and Bowerbank* and we entirely agree with that decision." The report does not indicate whether counsel had pointed out the inconveniences of the decision in *Jones*, and the court may not have adverted to them. The result of these cases was the fallacious assumption that there was a difference between A committing an act of gross indecency with B, and A procuring the commission of an act of gross indecency between himself and B, and that an attempt at the latter might not be an attempt at the former.

The Court of Criminal Appeal, now that it has assumed the power to overrule its previous decisions, might well disentangle this particular absurdity, and then the question whether the sending of a letter or the issuing of some other invitation, constituted an attempt to commit an offence against section 13 of the 1956 Act, or amounted only to incitement thereto, could be settled in accordance with general principle.[6] General principle does not, of course, dictate that an act which is sufficiently proximate to the procuring by A of an act of gross indecency between B and C, should be sufficiently proximate to the commission of an act of gross indecency between A and B. In the former case, although A will not be guilty of the completed offence until the act of indecency is committed (for such is the wording of section 13), the sending of a letter may well be all that *he* had to do to be guilty of the completed offence. This is not so where A envisaged an act of gross indecency between himself and B.

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[5] (1921) 16 Cr.App.R. 77.

[6] *Cf.* Glanville Williams, *Criminal Law*, London, 1953, p. 482.

Case and Comment *

ACCESSORY

Accessory after the fact

R. v. Revuelta

Court of Criminal Appeal: Lord Goddard C.J., Cassels and Ashworth JJ.: August 20, 1958: *The Times,* August 21, 1958.[1]

R. was convicted at quarter sessions of being accessory after the fact to stealing. According to R., he was driving a lorry to Covent Garden one morning when he saw a man by the side of the road with a number of parcels. R. said he realised that the man was a thief and, in order to secure his arrest, offered him a lift to London. To allay the man's suspicions, R. accepted some of the parcels. He later took the parcels to the police and gave them a description of the man. R. appealed to the Court of Criminal Appeal on the ground that the summing-up was unsatisfactory.

Held, allowing the appeal, that the Recorder, wishing to give full effect to the fact that R. had given the whole thing away to the police, did not seem to have told the jury what it was necessary to prove to constitute the offence, but had confused matters of mitigation and matters of defence. This man had undoubtedly been engaged in a very questionable transaction, but the only proper thing to do was to quash the conviction. [H. P.]

Commentary. If R. knew that the goods were stolen when he received them and he intended at that time to retain or deal with them dishonestly, he was guilty of receiving and it was immaterial that he subsequently handed the goods over to the police. That fact would, however, be rightly taken into account in mitigation.

If, on the other hand, R. intended, at the moment that he received the goods, to hand them over to the police, he was not guilty, and any subsequent change of mind would be immaterial, for a guilty retaining is not a guilty receiving: *R.* v. *Matthews* (1950) 34 Cr.App.R. 55.

EVIDENCE

Accomplice—corroboration—capital murder

See R. *v.* CHRIMES, p. 780, *post.*

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the appellant: *H. Galpin* (instructed by The Registrar, Court of Criminal Appeal).

Admissibility—medical report—urine sample taken without administering caution.[2]

R. v. Garside

Sheffield Assizes: Streatfeild J.: November 6, 1957.

The defendant was arrested and subsequently charged with causing death by dangerous driving and with driving a car whilst under the influence of drink. Shortly after his arrest, a police surgeon obtained a sample of the defendant's urine, but without warning him either that he was not obliged to give the sample, or that the results of its analysis might be used in evidence at his trial.

Held, that the result of the analysis was admissible in evidence: although such evidence had been obtained in consequence of an inadmissible confession or act it was not thereby rendered inadmissible. [D. C.]

Commentary. The rules of evidence which exclude confessions obtained by threats or promises have no application to situations in which the prisoner is improperly required to supply real evidence, or to enable evidence to be obtained—as by submitting to a medical examination: *R.* v. *Nowell* [1948] 1 All E.R. 794. Even, therefore, if an improper inducement had been held out in the present case, evidence as to the sample would have been admissible. *A fortiori*, mere failure to give a warning cannot render evidence of this kind inadmissible.

Cross-examination as to previous convictions—exercise of judicial discretion

R. v. Morris

Court of Criminal Appeal: Gorman, Paull and Elwes JJ.: August 18, 1959: *The Times*, August 19, 1959.[3]

M. was convicted at a Crown court of having had sexual intercourse with his stepdaughter, aged eleven. At the trial M. was cross-examined as to previous convictions for dishonesty. On appeal to the Court of Criminal Appeal, M. contended that the trial judge had wrongly exercised his discretion to allow such cross-examination. Certain aspersions on the character of the girl in question had been made but these were not such as to exclude the operation of paragraph (*f*) of the proviso to section 1 of the Criminal Evidence Act, 1898; and, even if they were, the questions as to previous convictions had been asked and answered before objection could be taken and before the judge could exercise his discretion.

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[2] For the prosection: *J. M. McClusk* (instructed by the D. P. P.). For the defence: *A. M. Lyons, Q.C.*, and *C. D. Chapman* (instructed by Owen, Bailey & Hulme, Huddersfield).

[3] For the appellant: *Gerald Wright* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *C. W. Guthrie Jones* (instructed by A. G. Harrison, Esq., Town Clerk, Wallasey).

Held, dismissing the appeal, that the general line of the defence seemed to have been to suggest that the girl in question had been thieving and tending to immoral behaviour, and that her mother was immoral. Those questions were not something incidental and the judge had exercised his discretion in the right way in allowing the questions to be put. Accordingly, the appeal would be dismissed.

Per curiam: This court desired to call attention to what had been said by Devlin J., giving the judgment of the court in *Cook* v. *The Crown* [1959] 2 W.L.R. 616 at p. 622, namely: "In cases of this sort where there is no hard and fast rule, some warning to the defence that it is going too far is of great importance; and it has always been the practice for prosecuting counsel to indicate in advance that he is going to claim his rights under the subsection, or for the judge to give the defence a caution." This court had referred to those words so that those who had not read them might have regard to them in the future. [H. P.]

Commentary. See the commentary on *R.* v. *Cook* [1959] Crim. L.R. 359.

FRAUD

Fraudulent trading—prosecution by the Board of Trade

R. v. Stansell and others

Central Criminal Court: His Honour Judge Aarvold: September 14, 1959.[4]

The defendants were all charged in the first count with conspiracy to defraud and in the second and third counts individual defendants were charged with fraudulent trading. On a motion to quash the third count on the ground that section 334 of the Companies Act, 1948, required that the prosecution should be by the Director of Public Prosecutions, whereas in this case the Board of Trade prosecuted without reference to the Director, reliance was placed on Buckley on the *Companies Acts*, 13th ed., p. 690, *Law Society* v. *United Service Bureau* [1934] 1 K.B. 343, *Curtis* v. *Old*

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[4] For the prosecution: *Neville Faulks* (instructed by Solicitor to the Board of Trade). For Stansell: *L. K. Lassman* (instructed by Martin, Samuels & Lipson, 361 Oxford St., W.1). For Millidge: *N. Primost* (instructed by Tarlo Lyons & Co., 6 Gate St., W.C.1). For Sansford: *H. Lester* (instructed by Martin, Samuels & Lipson). For Grossman: *J. Bolland* (instructed by Martin, Samuels & Lipson).

Monkland Conservative Association [1906] A.C. 86, and section 445 of the Companies Act, 1948. The prosecution in reply argued that subsection 5 of section 334 only applied where the steps laid down in the earlier subsections had been taken. In this case no reference had been made to the Director and so the normal right to prosecute remained. Section 445 was a mere rubric.

Held, section 334 did not limit prosecution as urged by the defence. Motion to quash dismissed.

[C. B. ORR, *Barrister-at-Law.*]

Note.—A ruling to the same effect was given by the Common Serjeant at the Central Criminal Court in *R.* v. *Lipschitz,* January Session, 1954.

Commentary. Section 334 (i) empowers the court, in winding up a company, to direct the liquidator in certain circumstances to refer a matter to the Director; s. 334 (ii) requires a liquidator, in voluntary winding up, to refer similar matters; and s. 334 (v) requires the Director to prosecute in any case which has been referred to him in which he considers a prosecution ought to be instituted.

By section 445, " Nothing in this Act relating to the institution of criminal proceedings by the Director of Public Prosecutions shall be taken to preclude any person from instituting or carrying on any such proceedings." The argument in the present case presumably was to the effect that " any person " did not include the Board of Trade, for, in *Law Society* v. *United Service Bureau, Ltd.,* it was held that " any person " in section 46 of the Solicitors Act, 1932, did not include a body corporate, and in *Curtis* v. *Old Monkland Conservative Association* it was held that " any person " in section 163 of the Income Tax Act, 1842, did not include an unincorporated association. However, the general rule is to the contrary for, by the Interpretation Act, 1889, s. 19: " in every Act passed after the commencement of this Act the expression ' person ' shall, unless the contrary intention appears, include any body of persons corporate or unincorporate." In the present case it would seem that the court did not discern a contrary intention in the statute.

HOMICIDE

Capital murder—accomplice—corroboration

R. v. Chrimes

Court of Criminal Appeal: Finnemore, Gorman and Salmon JJ.: April 10, 1959: *The Times,* April 11, 1959.[5]

C. was convicted at the Central Criminal Court of capital murder. The facts were that C. had set out with two others, P. and U., to burgle a bungalow where an old lady lived. They went there expecting to find money. When the old lady came out to challenge C. and P., C. put his hand over her mouth and forced her violently on to the concrete floor of an outhouse. She remained there for about five minutes and was then dragged to the scullery of the bungalow and again struck with great force. At the trial, P. was charged with murder and C. with capital murder but, on the prosecution offering no evidence against P., he was found not guilty by direction of the judge and was called as a witness for the prosecution. The issue for the jury was whether C.'s hand struck the fatal blows. P.'s evidence was that it was C. who struck the blows. On appeal to the Court of Criminal Appeal:

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[5] For the appellant: *Tristram Beresford, Q.C.,* and *John Rogers* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Christmas Humphries, Q.C.,* and *E. J. P. Cussen* (instructed by the Director of Public Prosecutions).

Held, dismissing the appeal, that one of the grounds of the appeal was that P.'s evidence, being the evidence of an accomplice, required to be corroborated. There was obvious corroboration from the evidence of the persons with whom C. was then lodging. They said that when C. came home after the murder he said he had " done the old lady " and produced a tyre lever covered with blood and hair. The appellant had further contended that the trial judge had given no proper direction to the jury as to the necessity for corroboration of P.'s evidence. The judge had told the jury that they should not accept the evidence of P. without corroboration, but he did not tell them what corroboration meant. However, the judge had referred to the evidence in detail, which contained the most overwhelming corroboration and, in those circumstances, it could not be said that the summing-up was in any way at fault and the appeal would therefore be dismissed. [H. P.]

Commentary. Section 5 (2) of the Homicide Act, 1957, provides, in effect, that where the *actus reus* of the murder amounts to capital murder, and two or more persons have malice aforethought in respect of it, " it shall be capital murder in the case of any of them who by his own act caused the death of, or inflicted or attempted to inflict grievous bodily harm on the person murdered, or who himself used force on that person in the course or furtherance of an attack on him; but the murder shall not be capital murder in the case of any other of the persons guilty of it."

If P. was present with the intention of assisting in the infliction of grievous bodily harm on the old lady, then he, too, was guilty of murder (but not capital murder) and, presumably an accomplice. If, however, P. did not intend to go beyond some lesser degree of violence, amounting perhaps to a common assault, he would not be guilty of murder at all (owing to the abolition of constructive malice by section 1 (1) of the Homicide Act) and, therefore, not an accomplice for the purposes of this trial: *Davies* v. *D. P. P.* [1954] A.C. 378. It seems to have been assumed in the accused's favour, however, that P. was an accomplice, notwithstanding his formal acquittal by the jury. In *Davies* the Court of Criminal Appeal seems to have regarded the fact that the witness, Lawson, had been acquitted as conclusive that he was not an accomplice: " The position, therefore, was that when Lawson gave his evidence he had been acquitted of the murder of Beckley and the prosecution submitted before this court that *he could not therefore be an accomplice to the charge of murder.* We think that this is so . . . ": [1954] 1 W.L.R. 214, 217. In that case, too, the witness had been acquitted because no evidence was offered. It is submitted that the fact that a witness has been acquitted is irrelevant at a later trial of another person for the same crime and the court should look at the substance of the matter—as the House of Lords did in *Davies* and, presumably, as the court did in the present case.

Capital murder—murder after theft to escape apprehension—direction to jury on burden of proof

R. v. Di Duca

Court of Criminal Appeal: Lord Parker C.J., Finnemore and Winn JJ.: May 26, 1959: *The Times*, May 27, 1959.[6]

D. was convicted at Assizes of the capital murder of M. The facts were that M., who was a shopkeeper was known to keep a quantity of cash in his room for the purposes of his business. D., who had been drinking with others in a public-house, found himself short of money and conceived the idea of stealing M.'s money. Accordingly, at about 4 p.m., D. went to M.'s rooms. D. said in evidence that there appeared to be no one in the rooms, so he went in and, after a search, found a bundle of notes which he put in his pocket. Then M. grabbed him by the shoulder and a struggle ensued in the course of which D. hit M. two or three times on the head with a heavy basin. As a result of his injuries M. inhaled blood and died from asphyxia. D. said that M. was a well-built man and reputedly violent and he had hit M. because he was frightened. On appeal to the Court of Criminal Appeal, D. contended that (1) the trial judge had misdirected the jury by telling them: " Surely the thief cannot be heard to say 'I was provoked into killing a man because I thought he might detain me or injure me or remember me.' That will not do "; and that (2) the judge had failed to direct the jury on the defence that D. was suffering from such an abnormality of mind, induced by the effect of drink, that his responsibility was impaired.

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[6] For the appellant: *D. P. Croom-Johnson, Q.C.*, and *Arthur Mildon* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *J. T. Molony, Q.C.*, and *Raymond Stock* (instructed by the Director of Public Prosecutions).

Held, dismissing the appeal, that as to (1) it was said that the passage in the summing-up meant that the thief could not complain if he considered the householder was going to hurt him, however severely. But the passage was one in which the judge was dealing with the question of motive, saying that a state of mind was not enough and there must be a reasonable apprehension of injury based on the behaviour of the deceased. In that context it was clear that the words could not be read in the sense for which the appellant contended. As to (2) it was true that the judge had not directed the jury on the standard of proof required of the defence, if such a defence was to be made out. Whether the transient effect of alcohol, even if it was toxic, could amount to an injury affecting the mind within the meaning of section 2 (1) of the Homicide Act, 1957, was doubtful; but it was not necessary to decide the matter. The behaviour of D. was at most evidence of the bravado induced by alcohol; and there was no evidence whatever of abnormality. The judge had, therefore, been right in not allowing the matter to be decided by the jury. Accordingly, the appeal would be dismissed. [H. P.]

Commentary. The murder was capital because committed in the course or furtherance of theft. This was so, notwithstanding the fact that D. had completed the theft, in the sense that he had done all that was necessary for an indictment for larceny to lie against him, before the deceased intervened. *Cf. R.* v. *Jones* [1959] Crim.L.R. 291.

The deceased was entitled to use only such force as was reasonably necessary to arrest D. and, had excessive force been used, D. would presumably have been able to justify using the minimum force necessary to preserve himself from death or grievous bodily harm, on grounds of self-defence.

No such defence appears to have been raised in the present case and presumably there was no evidence on which it could be based. Some kind of assault, however, is commonly relied on as evidence of provocation; and it seems clear that a killing in consequence of an assault which could not ground self-defence, might yet be reduced to manslaughter on the ground of provocation. The proposition that the apprehension of injury must be reasonable accords with the well-established rule that the provocation must be such as would deprive a reasonable man of his self-control.

Where the onus of proving a particular defence is put on the prisoner, he must surmount the preliminary hurdle of satisfying the court that there is evidence on which a reasonable jury could find, on a balance of probabilities, that the defence was made out. If he is unable to do so, he fails as a matter of law and, this being the position in the present case, it was immaterial that the judge had not told the jury that the onus on the prisoner of establishing diminished responsibility was not proof beyond reasonable doubt but only on a balance of probabilities.

Capital murder—murder of police officer

R. v. Marwood

Court of Criminal Appeal: Lord Parker C.J., Donovan and Salmon JJ.: April 20, 1959: *The Times*, April 21, 1959.[7]

M. was convicted at the Central Criminal Court of capital murder. The facts were that there had been a disturbance outside a dance hall when a fight broke out between young men with knives and choppers. A police constable intervened and most of the youths dispersed. Some, however, were unwilling to go and the police constable shouldered a youth to make him move on. Someone came up behind the constable and stabbed him in the back. Next day M. was questioned but, after telling the police that he was not at the scene, was released. Some six weeks later he went to a police station and said: "I did stab the copper that night: I will never know why I did it." He then made a written statement, after caution, in which he clearly admitted that he had a knife with him and that he must have struck the police constable with the knife. At the trial M.'s case was that he had never had a knife at all, and that he had struck the officer only with his bare fist. As to his written statement, M. said that he had never admitted having a knife and that, whilst part of the statement was true, some of the statements were the exact opposite of what he had said. On appeal to the Court of Criminal Appeal:

Held, dismissing the appeal, that this court had read and re-read the summing-up with the greatest care and considered it to have been very careful. This court could see no ground whatever for interfering with the verdict. [H. P.]

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[7] For the appellant: *Neil Lawson, Q.C.*, and *M. Levene* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Christmas Humphreys, Q.C.*, and *E. J. P. Cussen* (instructed by the Director of Public Prosecutions).

Manslaughter—neglect of child's injury—liability of wife

R. v. Watson and Watson

Manchester Assizes: Elwes J.: March 5, 1959.[8]

Joseph Watson and Marion Watson, who were husband and wife, were jointly charged with the manslaughter of their three-year old child. The case for the prosecution was that the child died three days after sustaining serious injury from scalding, and that the doctor, whose surgery was only three doors away from the defendants' house, was not sent for by either of the defendants until after the child was dead and that in all probability prompt medical attention would have saved the child's life.

At the close of the case for the prosecution, it was submitted, on behalf of the female defendant, that there was no case to go to the jury on the ground that where a husband and wife are living together, the wife cannot be convicted of manslaughter by neglect to supply food or medical aid to their child.

Held, that this proposition, which was supported, *inter alia*, by paragraph 2480 of the 34th edition of *Archbold*) was not good law, that the female defendant could be convicted of manslaughter, and that there was a case to go to the jury. [D. C.]

Commentary. The proposition in *Archbold* is " that where a husband and wife are living together, the legal obligation to maintain is on the husband, and the wife cannot be convicted of manslaughter by neglect to supply proper food or medical aid." The authority cited is an unreported case, *R.* v. *Forsyth*, Chester Summer Assizes, July 25, 1899, which is said to have followed *R.* v. *Squire*, Stafford Lent Assizes, 1799, MS., *Russell on Crime* (11th ed.), 460, and *R.* v. *Saunders* (1836) 7 C. & P. 277. In *Squire* a man and wife were charged with the murder of an apprentice and Lawrence J. directed the jury to acquit the wife, as it was not her duty to provide the apprentice with sufficient food and nourishment, she being the servant of her husband. In *Saunders* the wife alone was charged with the murder of her illegitimate child by, *inter alia*, withholding food. Alderson B., holding that there was no distinction between the case of an apprentice and that of a bastard child, directed an acquittal on the same ground that the wife, being the servant of her husband, was under no duty to find food for the child herself, and could only be made criminally liable if it were shown that she had omitted to give the child food which the husband had provided. Statute (4 & 5 Will. 4, c. 76, s. 71) at that time provided that a mother was bound to maintain her bastard child, *so long as she shall be unmarried or a widow*, evidently implying that her duty ceased when she married.

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[8] For the Crown: *Fenton Atkinson, Q.C.*, and *C. T. B. Leigh*. For both defendants: *J. S. Oakes*.

These old cases are clearly out of tune with modern notions of the relationship between husband, wife and children. The modern view is that "the wife is no longer the weaker partner subservient to the stronger but that both spouses are the joint, co-equal heads of the family": Bromley, *Family Law*, p. 148. Moreover, by the National Assistance Act, 1948, s. 42, it is provided that, for the purposes of that Act, "a woman shall be liable to maintain . . . her children." It is respectfully submitted that Elwes J.'s decision is a good one and that the authorities, cited in *Archbold*, are rightly regarded as of no authority since their basis, the subservience of the wife to the husband, has gone.

Murder—provocation and self-defence—misdirection on burden of proof

Bharat v. R.

Judicial Committee of the Privy Council: Lords Tucker and Denning and Mr. L. M. D. de Silva: July 29, 1959.[9]

The appellant, who was charged in Fiji with murder, was tried before a judge and five assessors. The appellant gave evidence which raised issues of self-defence and provocation. In his summing-up the trial judge raised the issue of provocation, but said that the burden of proof lay upon the defendant.

Held, allowing an appeal against conviction, that this misdirection, coupled with an erroneous description of what amounted to provocation in law, was fatal to the conviction: the judge, by his misdirection, disabled the assesors from giving him the aid which they should have given, and this, in turn, disabled him from taking their opinions into account as he should have done. [D. C.]

ROAD TRAFFIC

Dangerous and careless driving—police motor-cyclist

Gaynor v. Allen

High Court of Justice: Queen's Bench Division: McNair J.: May 27, 1959.[10]

As the plaintiff was crossing a road, which was subject to a

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[9] For the appellant: *E. F. N. Gratiaen* and *L. Kadirgamur* (instructed by T. L. Wilson & Co.). For the Crown: *D. A. Grant* (instructed by Charles Russell & Co.).

[10] For the plaintiff: *Michael Sherrard* (instructed by D. J. Freeman & Fraser). For the defendant: *Patrick O'Connor* (instructed by Ponsford & Devenish, Tivendale & Munday).

40 m.p.h. speed limit, she was knocked down by a police motor-cyclist who was driving at 60 m.p.h. in the course of his duties. The policeman was killed and the plaintiff brought an action for damages for negligence against the policeman's administratrix.

Section 3 of the Road Traffic Act provides that "The provisions of any enactment, or of any statutory rule or order, imposing a speed limit on motor-vehicles, shall not apply to any vehicle on an occasion when it is being used for . . . police purposes. . . ." It was submitted on behalf of the defendant that, in view of this section, no conclusion could be drawn from the fact that the policeman was driving at 60 m.p.h., and that he was not, therefore, negligent.

Held, The driver of this police motor-cycle on this occasion must be judged, as regards civil liability, in exactly the same way as any other driver of a motor-cycle in similar circumstances. He, like any other driver, owed a duty to the public to drive with due care and attention and without exposing the members of the public to unnecessary danger. *Held*, *further*, that the police motor-cyclist was negligent and that he was two-thirds to blame for the accident.

[D. C.]

Commentary. It is submitted with respect that it was rightly held that the fact that the police motor-cyclist was not committing a particular crime was irrelevant to the question of his civil liability. It does not follow from this case that what would be negligent for a civilian driver is necessarily so for a policeman. It is thought that if, for example, a police driver were pursuing an escaping criminal at a high speed, keeping a proper look-out and maintaining proper control over his machine, he might not be liable for injuries accidentally caused to a pedestrian; whereas a civilian driver, driving in exactly similar manner but racing with a friend, clearly would be so liable.

Scots law—Motor Vehicles (Construction and Use)

See DICKSON *v.* BROWN, below.

SCOTS LAW

Relevance of libel—number of offences in regulation

Dickson v. Brown

High Court of Justiciary: Lord Justice-Clerk (Thomson), Lords Patrick and Mackintosh: December 17, 1958.[11]

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[11] For the appellant: *Bennett* (instructed by J. & A. Hastie, S.S.C.). For the respondent: *Rose* (instructed by Russell & Dunlop, W.S.).

The driver of a motor-van was charged with a contravention of Regulation 73 (1) of the Motor Vehicles (Construction and Use) Regulations, 1955, in that he "did use said motor-van when the number of passengers carried by it, namely two passengers, and the distribution and adjustment of its load, consisting of said two passengers, was such that danger was likely to be caused to any of said passengers, or to persons on the road."

Regulation 73 provides: "Every motor vehicle . . . shall at all times be in such condition and the number of the passengers carried by, and the weight, distribution, packing and adjustment of the load of, such vehicle . . . shall at all times be such that no danger is caused or is likely to be caused to any person on the vehicle . . . or on the road."

Objections were stated to the relevancy of the complaint.

Held, that regulation 73 (1) created three separate offences in respect of (*a*) the condition, (*b*) the passengers and (*c*) the load of the vehicle, and that the complaint was irrelevant in that it conjoined the second and the third elements of the subsection. [D. C.]

Commentary. In Scots law an objection to the relevancy of a criminal libel (the part of the indictment in which the actual charge is set forth) "raises the question whether the libel as a whole is sufficient in law to justify the court in calling upon the person accused to plead to the charge made in it." (Renton and Brown, *Criminal Procedure*, 97).

In similar circumstances in English law an information would be defective on grounds of uncertainty. *Cf. Thompson* v. *Knights* [1947] K.B. 336; *Bastin* v. *Davies* [1950] 2 K.B. 579.

SENTENCE

Appeal against sentence for larceny of and taking and driving away a motor-cycle—no jurisdiction to quash conviction

R. v. West

Court of Criminal Appeal: Lord Parker C.J., Slade and Winn JJ.: June 22, 1959: *The Times*, June 23, 1959.[12]

W. had been convicted by justices of the larceny of a motor-cycle and of taking away the same motor-cycle without the consent of the owner. He was committed for sentence to quarter sessions and sentenced to one day's imprisonment. Six years later he applied to the Court of Criminal Appeal for leave to appeal against his sentence.

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[12] The appellant did not appear and was not represented.

Held, refusing the application, that the court saw the difficulty involved in saying that W. could be guilty of both the offences, but no appeal lay to this court against conviction. Assuming that W. could have been properly convicted of only one of these offences, no one could say that a sentence of one day's imprisonment was excessive. Accordingly, leave to appeal would be refused. [H. P.]

Commentary. A person summarily convicted by the justices and committed to quarter sessions for sentence is considered to have been convicted on indictment and can appeal against his sentence to the Court of Criminal Appeal. Under section 7 (1) of the Criminal Appeal Act, 1907, a person desiring to appeal must give notice within ten days of the date of his conviction; but, except in the case of a sentence of death, the time may be extended at any time by the Court of Criminal Appeal.

What was the difficulty in the way of saying that W. could be guilty of both offences is not clear. It would seem that every case of larceny of a motor-vehicle, by taking and driving it away, is also an offence under section 28 of the Road Traffic Act, 1930.

STREET TRADING

Application for an injunction to restrain persistent breaches of by-law

Att.-Gen. v. Harris

High Court of Justice: Queen's Bench Division: Salmon J.: May 4, 1959.[13]

The defendants had sold flowers from stalls near the entrance to a cemetery in Manchester on Sundays since 1955. The stalls were about 7 feet long, and projected between 2 feet 6 inches and 3 feet 6 inches from the railings of the cemetery, into a footway, which was between 15 and 16 feet wide, and which was normally used on Sundays by only a few pedestrians. The defendants, in trading in this manner, committed offences under the Manchester Police Regulation Act, 1844, and had, in consequence, been prosecuted on many occasions.

The Attorney-General brought this action for an injunction to restrain the defendants from committing further breaches of the Act.

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[13] For the Attorney-General: *Fenton Atkinson, Q.C.*, and *J. M. Lever* (instructed by Town Clerk, Manchester). For the defendants: *Rose Heilbron, Q.C.*, and *Ivor R. Taylor* (instructed by Julian S. Goldstone & Co., Manchester).

Held, (1) that it was the duty of the court in all relator actions to inquire whether the acts done by the defendants in truth injured the public: if they did, the fact that the injury was small would not, providing that it was real, entitle the court to withhold the injunction; but if it was established that the public had in fact suffered no injury, the court might, in the exercise of its discretion, refuse an injunction; and (2) that, although a statutory provision could be contravened without injury only in the most exceptional circumstances, the acts of the defendants in this case had not tended to injure the public, an injunction would not be granted. [D. C.]

Commentary. Where an Act creates an offence and provides a remedy, the only remedy, as a general rule is that provided by the Act: *Institute of Patent Agents* v. *Lockwood* [1894] A.C. 347. If the individuals who felt themselves aggrieved by the defendants' breaches of the statute in the present case had brought the action personally, they would certainly have failed. The position is different, however, where the Attorney-General intervenes: "The public is concerned in seeing that Acts of Parliament are obeyed, and if those who are acting in breach of them persist in doing so, notwithstanding the infliction of the punishment prescribed by the Act, the public at large is sufficiently interested in the dispute to warrant the Attorney-General intervening for the purpose of asserting public rights, and if he does so the general rule no longer operates; the dispute is no longer one between individuals, it is one between the public and a small section of the public refusing to abide by the law of the land": *Att.-Gen.* v. *Premier Line, Ltd.* [1932] 1 Ch. 303, 313, *per* Eve J.

The basis of the jurisdiction to grant an injunction appears to be the inadequacy of the statutory remedy. The statutory remedy was plainly inadequate in this case. But the grant of an injunction, as of all equitable remedies, is discretionary, and the court was unwilling to exercise its discretion in favour of the Attorney-General on the ground that there was no evidence that the public were suffering any injury. Undoubtedly the florists who had been exerting pressure for the institution of the proceedings were suffering some economic loss; but this, clearly, was not an injury to the public nor the kind of harm which the contravened Police Regulations were designed to prevent.

An alternative remedy which might still be available to the aggrieved persons is that of a binding over order under the Justices of the Peace Act, 1361. Under this Act, magistrates may lawfully require sureties for a sum greater than the maximum fine which could be imposed for the offence itself. "Thus one of the most frequent occasions on which this hoary statute is invoked is when a petty delinquent—*e.g.*, a street trader, a rag merchant or a street bookmaker or his 'runner'—has repeatedly committed the same offence; the penalty for it is perhaps trifling and he is cheerfully prepared to pay it again and again as a regrettable but inconsiderable part of his business expenses": C. K. Allen, *The Queen's Peace*, 65. See also Glanville Williams, "Preventive Justice and the Rule of Law" (1953) 16 M.L.R. 417, and *Bamping* v. *Barnes* [1958] Crim.C. & C. 13.

TRIAL

Direction to jury—failure to remind jury of defence

R. v. Laski and Shaw

Court of Criminal Appeal: Lord Parker C.J., Donovan and Salmon JJ.: April 29, 1959.[14]

L. and S. were convicted at the Central Criminal Court of conspiring to defraud persons who supplied goods to S., Ltd. On, appeal to the Court of Criminal Appeal:

Held, dismissing the appeal, that there was evidence which the jury could accept that L. and S. had agreed that the creditors of S., Ltd., or some of them, should never be paid, and that L. and S. should benefit as a result. After the jury had retired for three-and-a-half hours they asked for guidance on the law of conspiracy and the Commissioner addressed them for ten minutes. He did not repeat the defences as some judges would have done; but it would be unreal to conclude that the jury had forgotten the defences. The appellants also complained that the commissioner had seemed to direct the jury that there would be an intent to defraud if the affairs of the company were so ordered that it would be a natural consequence that persons would lose their money. Such a direction, had it been made, would have been wrong. But if, in the present case, the jury found that the methods adopted by the appellants inevitably meant that the debts of the company would not be paid, then that was not merely a protection of the assets of the company but a defrauding of the creditors. There was no ground for interfering with the verdict and the appeal would be dismissed. [H. P.]

Acts and Orders[*]

Agriculture

WEEDS ACT, 1959 (7 & 8 Eliz. 2, c. 54) (6d.). Operative July 16, 1959. This Act consolidates provisions for the prevention of the spreading of injurious weeds taken from four Acts, *viz*., the Corn Production Acts (Repeal) Act, 1921 (11 & 12 Geo. 5, c. 48); the Agriculture Act, 1947 (10 & 11 Geo. 6, c. 48); the Agriculture

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[14] For Laski: *W. Howard* (instructed by Claud Hornby & Co.); for Shaw: *D. MacIntyre* and *C. Nicholls* (instructed by Wiseman & Greenman). For the Crown: *J. Buzzard* and *M. Worsley* (instructed by the Director of Public Prosecutions).

[*] Prepared by F. MAURICE DRAKE, *Barrister-at-Law*.

(Scotland) Act, 1948 (11 & 12 Geo. 6, c. 45); the Agriculture Act, 1958 (6 & 7 Eliz. 2, c. 71). The Act applies to spear thistle, creeping or field thistle, curled dock, broad-leaved dock and ragwort, and may be applied by Regulations made by the Minister to other weeds (s. 1 (2)). Section 1 gives power to the Minister of Agriculture, Fisheries and Food to serve upon the occupier of land on which the Minister is satisfied that there are injurious weeds to which the Act applies a notice in writing requiring him within the time specified in the notice to take such action as may be necessary to prevent the weeds from spreading. Section 2 (1) provides that unreasonable failure on the part of the person served with a notice under section 1 to comply with the requirements of the notice constitutes an offence. The penalty, on summary conviction, is a fine not exceeding £75 or, in the case of a second or subsequent offence, a fine not exceeding £150. Section 2 (2) provides that where a person is convicted of an offence under section 2 (1) and fails to remedy the position with regard to the weeds within 14 days after the conviction, he shall be guilty of a further offence and may be punished accordingly. Proceedings under section 2 (1) are not to be instituted except by the Minister. The Act also confers on the Minister certain powers of entry on land and the right to take default action where the occupier has failed to act. The Act extends, with modifications, to Scotland, but not to Northern Ireland.

Animals

A technical amendment makes it clear that the principal Regulations (S.I. 1958, No. 2166) shall apply in London in the same way as elsewhere in England and Wales. Operative September 5, 1959. SLAUGHTER OF ANIMALS (PREVENTION OF CRUELTY) (AMENDMENT) REGULATIONS, 1959 (S.I. No. 1493) (2d.).

DOG LICENCES ACT, 1959 (7 & 8 Eliz. 2, c. 55) (9d.). Operative July 16, 1959. This Act consolidates enactments relating to dog licences taken from eight statutes of which the earliest is the Dog Licences Act, 1867, and the latest the Finance Act, 1958. Offences are dealt with in sections 12–15. It is an offence to keep a dog without a dog licence (s. 12); failing to produce a dog licence within a reasonable time to a police constable or "authorised officer" as defined in the section (s. 13); and making a false statement in a declaration made under section 4 of the Act for the purpose of obtaining exemption for sheep dogs (s. 14). Section 15 provides for the manner of proceedings for offences. The Act applies to Scotland, but not to Northern Ireland.

Atomic Energy

Nuclear Installations (Licensing and Insurance) Act, 1959 (7 & 8 Eliz. 2, c. 46) (1s.). Provision is made for the regulation of installations capable of emitting ionising radiations. It is an offence for any person other than the Atomic Energy Authority to use any site for a number of purposes connected with atomic energy unless licensed by the Minister so to do (s. 1 (1) and (2)); and if licensed so to do, the person must obey certain requirements with regard to the displaying on the site of certain conditions which may have been included in the licence (s. 1 (6)). It is further an offence to contravene any condition which the Minister may have imposed in granting such a licence (s. 1 (7)). The penalty for contraventions of these requirements is laid down in section 1 (7). Section 2 deals with the revocation and surrender of licences and makes it an offence to contravene any directions given by the Minister in order to prevent damage from radiation from the site, and provides for the penalties for contraventions (s. 2 (4)). Section 5 requires the licensee of a nuclear site to provide cover by insurance or other means against damage caused by the operation or existence of the site, and provides for penalties for contraventions (s. 5 (4)). Section 6 requires the licensee to report dangerous occurrences on the site, and provides for the penalties for contraventions of this requirement (s. 6 (2)). Section 7 provides for the appointment of inspectors to assist the Minister in the operation of the Act, and makes it an offence (a) for any person to obstruct an inspector in the exercise of his powers and (b) for any person improperly to disclose information obtained in the exercise of his powers, and provides penalties for contraventions of these requirements (s. 7 (3) and (4)). Section 8 deals with the position where the foregoing offences are committed by bodies corporate. Proceedings in respect of any offence under the Act may only be instituted by the Minister or by or with the consent of the Director of Public Prosecutions. The Act applies to Scotland and, with certain modifications, to Northern Ireland (s. 12), and may be extended with any necessary exceptions, adaptations and modifications, by Order in Council, to the Channel Islands or the Isle of Man.

Customs and Excise

Finance Act, 1959 (7 & 8 Eliz. 2, c. 58) (2s. 6d.). Excise duties are to be charged on mechanically propelled vehicles kept but not used on roads from October 1, 1959 (s. 10).

Highways

HIGHWAYS ACT, 1959 (7 & 8 Eliz. 2, c. 25) (12s. 6d.). Operative January 1, 1960. This Act consolidates, with amendments, certain enactments relating to highways, streets and bridges in England and Wales, including certain enactments commonly contained in local Acts. Part VII deals with offences and provides for the penalties for such offences in connection with unlawful interference with highways and streets. The offences included are in connection with the following matters: section 117 (damage to highways, streets and their surrounds); section 119 (ploughing of footpaths or bridleways); section 120 (damage to highways and streets in consequence of the unlawful exclusion of the sun and wind by hedges, trees, etc.); section 121 (wilful obstruction of the free passage along a highway, for which offence a constable may arrest without warrant); section 122 (erecting buildings, fences, etc., unlawfully in a highway); section 123 (planting trees in or near a carriageway); section 125 (failure to comply with a notice to enlarge gates across highways); section 127 (depositing rubbish, pitching stands, stalls or booths); section 129 (removal of snow, soil, etc., which has fallen on highways); section 130 (prevention of soil, etc., being washed into street); section 132 (putting up doors, gates, etc., opening outwards into street); section 133 (power of local authorities to make by-laws to prohibit gates, etc., opening outwards and penalty for contravention of such by-laws); section 134 (power of appropriate authority to lop overhanging hedges and trees); section 135 (straying horses, cattle, sheep, goats and swine); section 140 (causing certain kinds of danger and annoyance, lighting fires, letting off fireworks, playing football and other games on highways to annoyance of highway users); section 141 (placing rope, etc., across highway); section 142 (prevention of water falling or flowing on to highway); section 143 (power of appropriate authority to require removal of barbed wire); section 144 (dangerous land adjoining street); section 145 (dangerous buildings and structures adjoining street); section 146 (regulation of temporary deposit of building materials, etc., in streets); section 147 (hoardings to be set up during building, etc.); section 148 (hoardings to be securely erected); section 149 (unlawful interference with barriers or lights erected or placed on highways); section 150 (leaving unlighted obstructions, heaps of materials, etc., on highways); section 151 (restrictions on construction of bridges without licence of appropriate highway authorities); section 152 (restrictions on placing rails, beams, etc., over highways); section 153 (prohibition of construction of cellars, etc., under carriageways without permission); section 154 (openings into and repairs of cellars, etc., under streets); section 155 (construction of carriage crossings and access ways to highway without consent); section 156 (power to instal refuse or storage bins in streets).

Section 168 provides that any person executing work on a highway otherwise than in accordance with any condition imposed on the passing of the plans for that work, shall be liable to a fine in the same way as if the work had been carried out in contravention of a by-law.

Section 262 contains a general provision making it an offence to obstruct any person acting in the execution of the Act or of any by-law or Order made under the Act. Sections 269–278 provide for the manner of prosecuting for offences under the Act, and provide for the administration of the penal sections of the Act. All offences under the Act or under by-laws made under the Act are to be punishable on summary conviction (s. 269). Proceedings for offences specified in the 17th Schedule (which are provisions re-enacting with or without amendment public health enactments) are to be taken only by a person aggrieved or by the local council or highway authority, unless the Attorney-General gives written consent to some other person or authority to take such proceedings. Sections 273–277 deal with appeals.

London Traffic

The following Orders have been made prohibiting waiting: S.I. Nos. 1272 (Basildon) (3d.); 1605 (Amersham-on-the-Hill) (3d.).

The following Order has been made detailing prescribed routes: S.I. No. 1588 (Reigate) (2d.).

The following Order has been made imposing a speed limit of 40 m.p.h.: S.I. No. 1615 (certain parts of the London–Bristol Trunk Road, Route A.4, in the Borough of Brentford and Chiswick) (3d.).

Landlord and Tenant

LANDLORD AND TENANT (FURNITURE AND FITTINGS) ACT, 1959 (7 & 8 Eliz. 2, c. 64) (6d.). Further prohibitions are added to those already existing under previous Acts, in connection with the requirement of exorbitant sums for the purchase of furniture and fittings as a means of obtaining premiums for rented dwellings. It is made an offence by the Act to " offer " furniture or fittings at an excessive price in connection with a proposed letting or assignment on terms which require the purchase of furniture or fittings, whether or not a contract is actually concluded. It is also made an offence to fail to furnish, to anyone to whom particulars of the tenancy are given, a written inventory of the furniture and fittings, specifying the price required for each item (s. 1 (1)). Local authorities are empowered to enforce the Act (s. 1 (2)), and where necessary may obtain a warrant, on sworn information to a magistrate, to enable them to inspect the premises to discover whether an offence under the Act has been committed. It is an offence to obstruct any person acting in pursuance of such a warrant (s. 1 (5)). The Act applies to Scotland, but not to Northern Ireland.

Lunacy and Mental Health

MENTAL HEALTH ACT, 1959 (7 & 8 Eliz. 2, c. 72) (8s. 0d.). Operative on such dates as the Minister may appoint. This Act repeals the Lunacy and Mental Treatment Acts, 1890–1930, and the Mental Deficiency Acts, 1913–1938, and provides one legal code to cover both mental illness and mental deficiency, instead of the two codes previously existing. It makes very considerable changes in the law, and the full provisions will be dealt with in a comprehensive article to appear in a future issue of the *Criminal Law Review*.

Magistrates' Courts

METROPOLITAN MAGISTRATES' COURTS ACT, 1959 (7 & 8 Eliz. 2, c. 45) (6d.). Operative July 9, 1959. Authority is given for the appointment of a maximum of eight additional stipendiary magistrates (s. 1), though it is not at present anticipated that there will be need for more than two extra magistrates. Section 2 provides for the appointment by the Lord Chancellor of acting metropolitan stipendiary magistrates being barristers or solicitors of not less than seven years' standing, for periods not exceeding three months at one time. Section 3 enables the Receiver for the Metropolitan Police District to hold land and buildings for the purpose of the probation system in the metropolitan stipendiary court area. Section 4 authorises the Receiver to borrow money for certain purposes.

Obscene Publications

OBSCENE PUBLICATIONS ACT, 1959 (7 & 8 Eliz. 2, c. 66) (6d.). Operative August 29, 1959. This Act repeals the Obscene Publications Act, 1857, and supersedes the common law offence of publishing an obscene article. "Obscene" is defined in section 1 (1), "article" in section 1 (2) and "publish" in section 1 (3). Section 1 makes the test of obscenity if the effect of the article or the effect of any one of its items, if taken as a whole, is such as to tend to deprave and corrupt persons who are likely, having regard to all the relevant circumstances, to read, see, or hear the matter in it. The Act does not apply to public cinematograph showing (s. 1 (3)).

Section 2 (1) makes obscene publication punishable summarily by a fine not exceeding £100 or imprisonment not exceeding six months, and on indictment punishable by a fine or imprisonment not exceeding three years or both. Summary proceedings must be brought within twelve months (s. 2 (2)), and a prosecution on indictment within two years of the commission of the offence (s. 2 (3)). Two special defences to a prosecution under this section are created. By section 2 (5) it shall be a defence for a person charged to prove that he had not examined the article in respect of which he is charged and had no reason to expect that it was obscene. By section 4 it is a defence to prove that publication is justified as being for the public good and in the interests of science, literature, art or learning or of other objects of general concern. Expert evidence may be called as to this defence by either side (s. 4 (2)). Either of these defences may also be raised against forfeiture of the article concerned.

Powers of search, seizure and forfeiture are outlined in section 3. By section 3 (1) a justice of the peace, having been satisfied by information on oath may issue a warrant, valid for 14 days, empowering a constable to enter and search any premises, stall or vehicle and to seize and remove any articles which he has reason to believe to be obscene articles and to be kept for publication for gain. Section 3 (2) gives him power when making any such seizure under the warrant to seize and remove any documents which he finds which relate to a trade or business carried on from the premises, stall or vehicle. Section 3 (3) allows the relevant magistrates' court to forfeit such articles, if satisfied that at the time when they were seized they were obscene articles kept for publication for gain. No order shall be made unless the person summoned appears or service of the summons is proved. Section 3 (4) entitles the person summoned, or the owner, author or maker of any of the articles brought before the court, or any person through whose hands they passed before being seized, to appear and show cause against forfeiture. Section 3 (5) enables such a person to appeal against the forfeiture to quarter sessions or to the High Court by case stated. No such order for forfeiture is to take effect until 14 days after the day on which the order is made, or determination or abandonment of the appeal or case stated. The court may order the informant for the seizure to pay costs to a successful opponent of forfeiture (s. 3 (6)). Such costs are to be enforceable as a civil debt as in the procedure laid down by the Costs in Criminal Cases Act, 1952. Section 3 (7) rules that for the purposes of this section (seizure and forfeiture) the question of obscenity shall be determined on the assumption that copies of it would be published in any manner likely, having regard to the circumstances in which it was found, but in no other manner.

The Act does not apply to Scotland or Northern Ireland.

Public Service Vehicles

The Metropolitan Traffic Area (Drivers' and Conductors' Licences) Order, 1934 (S.R. & O., 1934, No. 1400), provided *inter alia*, for the transfer of the function of granting licences to drive or act as conductor of public service vehicles to persons resident in the Metropolitan Traffic Area from the Metropolitan Traffic Commissioner to the Commissioner of Police of the metropolis, and for this purpose the Order made adaptations and modifications of certain of the provisions of Part IV of the Road Traffic Act, 1930. The 1934 Order is now amended so as to clarify the effect of these adaptations and modifications and to make further adaptations and modifications of the following other provisions of Part IV of the Act of 1930: (a) section 73 (3) (which provides that a licence issued in one traffic area shall be valid in every other area); (b) section 77 (4) (which provides for the revocation and suspension of licences); (c) section 79 (which provides for the procedure on applications for licences); and (d) section 94 (which provides for regulations to be made, *inter alia*, as to the return of void or revoked licences). Operative September 15, 1959. METROPOLITAN TRAFFIC AREA (DRIVERS' AND CONDUCTORS' LICENCES) ORDER, 1959 (S.I. No. 1587) (3d.)

Quarter Sessions

CRIMINAL JUSTICE ADMINISTRATION (AMENDMENT) ACT, 1959 (7 & 8 Eliz. 2, c. 41) (3d.). Operative July 9, 1959. Section 15 of the Act of 1956 is amended in relation to the power of a recorder to form additional courts of quarter sessions in boroughs when authorised by a resolution of the borough council under section 168 of the Municipal Corporations Act, 1882.

Scotland

The Probation (Scotland) Rules, 1951 (S.I. 1951, No. 1261), are amended by reducing the age at which probation officers may be appointed, by providing that part-time officers appointed subsequent to the date of operation of these Rules who are afterwards appointed as whole-time officers will be so appointed subject to confirmation by the Secretary of State after twelve months' whole-time service, and by providing that probation officers, during their preliminary period of service, will be paid the salaries set out in the Schedule to these Rules. The Rules take account of the new title of the Scottish Probation Advisory and Training Council. Operative September 30, 1959. PROBATION (SCOTLAND) AMENDMENT (No. 3) RULES, 1959 (S.I. No. 1578) (3d.).

Subject to those places specified in the Schedule to the Order (being various ports and export quarantine stations) the whole of Scotland is declared an Attested Area under the provisions of section 5 of the Diseases of Animals Act, 1950. The area will continue to be subject to the provisions of the Tuberculosis (Area Eradication) Order, 1950 (S.I. 1950, No. 2006, as amended by S.I. 1954, No. 762, and S.I. 1955, No. 1449), which provisions include, *inter alia*, a prohibition against movement of cattle into an eradication area or attested area except under licence or on certain journeys. Two earlier Orders (S.I. 1958, No. 1555, and S.I. 1959, No. 234) which declared certain areas of Scotland to be an Eradication Area and substantially the rest of Scotland to be an Attested Area, are now revoked. Operative October 1, 1959. TUBERCULOSIS (SCOTLAND ATTESTED AREA) ORDER, 1959 (S.I. No. 1590) (3d.).

For penalties for contraventions, see section 79 of the Diseases of Animals Act, 1950.

LICENSING (SCOTLAND) ACT, 1959 (7 & 8 Eliz. 2, c. 51) (6s. 0d.) Operative January 1, 1960. This Act, with minor exceptions, replaces and re-enacts the Licensing (Scotland) Act, 1903, and consolidates all the other enactments relating to licensing in Scotland with the exception of the Customs and Excise Act, 1952, which, with the Orders made thereunder, contains the law relating to excise licences and duties.

Welsh Courts

A new scale of fees payable to interpreters in Welsh courts was introduced on September 14, 1959. WELSH COURTS (INTERPRETERS) RULES, 1959 (S.I. No. 1507) (2d.).

Practical Problems

All questions for consideration should be addressed to "The Editor, The Criminal Law Review, 11 New Fetter Lane, London, E.C.4." The questions of readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

62. *Malicious damage—charge when value of property less than £20*

When preferring charges of malicious damage to property where the value of the damage is under £20 I have always quoted the offence as being contrary to section 14 of the Criminal Justice Administration Act, 1914. However, on reading this section in conjunction with section 51 of the Malicious Damage Act, 1861, as amended by the Act of 1914, I have my doubts as to the correctness of this procedure.

Am I correct in stating that, prior to the passing of the Act of 1914, section 51 of the Malicious Damage Act, 1861, only applied to damage over the value of £5 but that this section, as amended by section 14 (2) of the Criminal Justice Administration Act, 1914, now applies to damage of any value with the proviso that a summary court will not commit for trial unless the value of the damage is over £5? If so it appears that legislation intends section 51 of the 1861 Act to be used for damage of any value and section 14 (1) of the 1914 Act merely restricts the penalty which summary courts may impose where the value of the damage is under £20.

Does section 14 of the Act of 1914 create the offence of malicious damage to property under the value of £20 or does it only give summary courts power to deal with and punish such cases? If section 14 (1) *does* create the offence could one charge the offence of malicious damage to property specifically mentioned in the Malicious Damage Act (for example, works of Art under section 39) as being an offence contrary to section 14 of the 1914 Act or *must* one quote the appropriate section of the 1861 Act, even though the value of the damage be under £20?

Finally, I have always classified as indictable offences malicious damage to the value of £20 or more. In view of the above, and in particular, in view of the case of attempted malicious damage reported at [1956] Crim.L.R. 542 to 544, am I correct in assuming that cases of malicious damage over the value of £5 should be classified as indictable offences, although of course, such offences may be dealt with summarily? [F. C.]

ANSWER

In my opinion section 14 (1) of the Criminal Justice Administration Act, 1914, was merely intended to give power to a court of summary jurisdiction to deal with offences under section 51 of the Malicious Damage Act, 1861, and to lay down limited penalties which could be imposed on summary trial. In support of this view (i) the printed statute has certain headings, and the heading concerning sections 12–15 inclusive is " New Powers of dealing with offenders " ; whilst the whole Act was clearly designed to deal with *administration* as its very name implies and (ii) it would seem very odd that section 14 (2) of the 1914 Act should extend the jurisdiction of summary courts to deal with malicious damage to property under £20 if section 14 (1) has just created a new offence identical in scope.

In my opinion the intention of the legislature was, quite clearly, that section 14 (1) should merely provide for the penalties whilst section 14 (2) gave the magistrates' courts the jurisdiction to try the cases; and it would indeed be a very curious arrangement of a statute if the penalties were prescribed before the jurisdiction was conferred!

Therefore, technically the offender should perhaps be charged under section 51 of the Act of 1861 *and* section 14 of the 1914 Act. But as this latter section refers to the 1861 Act I think the charge is complete and correctly framed if under the 1914 Act alone.

It is quite clear from sections 14 (2) (3) of the Act of 1914 that the magistrates' court still has power to commit for trial where the damage alleged exceeds £5. You are therefore correct in classifying such cases as indictable offences which may be dealt with summarily. [M. D.]

Books and Periodicals

Stone's Justices' Manual. 91st edition by J. Whiteside and J. P. Wilson. London: Shaw & Sons; Butterworth & Co. 1959. 2 Vols. Thick edition, 92s. 6d. net. Thin edition, 97s. 6d. net.

In every lawyer's library there should be a copy of the current edition of *Stone's Justices' Manual* since there is no other publication covering the same field that contains so much useful and up-to-date information. Anyone who refers to the two volumes will be grateful to and in awe of the editors, who, patently, go to great lengths to ensure that the two volumes are as informative as is possible. Merely ensuring that the publication contains so much information must be an arduous, albeit interesting, task, and it is, perhaps, unfair to ask the editors to add to their labours, but the year is fast approaching when the various sections will have to be regrouped in order to facilitate the finding of information.

The publication is a manual—a guide to research—rather than an authoritative textbook; it should not, and I am sure the editors do not wish it to be, treated as a pocket edition of, for instance, Halsbury's *Statutes of England.* Therefore, the publication should have all the attributes of a manual, and, for instance, references to statutes and their sections should be printed in a larger and blacker type and a table of penalties and the courts wherein the various offences may be tried should appear in both volumes.

Stone's Justices' Manual is a unique publication and is so well thought of by magistrates, their clerks, and advocates that the phrases, " But that is what *Stone's* says," and, " But it is not in *Stone's* " are often irrefutable arguments. *Stone's*, in fact, sets the standard of behaviour in many a magistrates' court, and the editors should, proudly, bear this in mind when preparing the preliminary sections of the publication and, in particular, those headed " Proceedings at the Hearing " and " Evidence." Magistrates are frequently ignorant of the law and, yet, unwilling to be advised by their clerks unless they can produce written matter which supports their advice. The editors should, therefore, stress the need for the magistrates to ensure that the rules of procedure and evidence are observed, and that an accused should be convicted only upon properly presented evidence. Indeed, the reference to the need for magistrates observing these rules in the first sentence of the section on evidence at page 324 should be printed in heavy type and amplified.

At page 265 reference is made to the magistrates' right to question a witness; a right which is not denied, although the editors quote a mere article in support of their contention, but should be exercised on rare occasions. The editors, however, guide the magistrates in this respect by a mere quotation, " [The magistrate] should not take an undue part in the examination of witnesses," from the case of *Yuill* v. *Yuill*; whereas the case of *Jones* v. *The National Coal Board* [1957] 2 All E.R. 155 shows much more emphatically how improper it would be for a magistrate to direct his questions to doing other than clarifying a specific ambiguity, and, certainly, that he should not assist the prosecutor by causing the witness to refer to a vital piece of evidence that the prosecutor has omitted to prove.

Were *Stone's Justices' Manual* not so highly regarded, it would not have so much influence upon the behaviour of magistrates and advocates, but, as has been stated, the *Manual* sets, in many courts, the standard of behaviour and either those preliminary sections should be omitted altogether or be more fully written.

Stone's Justices' Manual is a publication without which a practising lawyer cannot afford to be, and, although a reader may find reason to comment upon or criticise some of its contents, its standard as a legal publication is of the highest.

BRIAN FRASER HARRISON.

The Probation Service. Edited on behalf of the National Association of Probation Officers by Joan F. S. King, B.A. London: Butterworth & Co. (Publishers), Ltd. 1958. 236 and (index) 4 pp.

This book is primarily designed to provide food for thought. It may be described in essence as taking stock of the present position and the past influences which have played upon the Probation Service. The Preface makes this point, observing, at the same time, that it does not pretend to be a legal textbook or a manual of instruction. The value of Elizabeth Glover's book, *Probation and Re-education*, 1956, is in no manner decreased, and indeed this book is clearly not intended to supplant that excellent work.

Since the chapters are apparently written by different serving probation officers (a list of those who supplied material or advice is given at page vii), the inevitable criticism is that they tend to overlap. For example, chapters one and ten, both of which deal with the growth of the Service, cover, in part at least, much the same ground. The reader, primarily interested in the legal approach, will find chapter three, Casework in Probation and Supervision Cases, chapter four, Aftercare, and chapter five, Matrimonial Conciliation, of particular interest. There is also a very helpful consideration of the court duty of the probation officer in chapters eight (pp. 157–159) and nine.

There are a number of points, however, which the lawyer at least would have liked to have discussed more fully and which are omitted or only touched upon lightly. For example, the practice of supervision of children by a male or female probation officer (p. 92) does not consider the benefit, with adults also, of choosing the sex of the officer according to the needs of the probationer. The pre-trial inquiry for juveniles is also a matter of very practical interest: is it much used and to good effect? In this connection the question arises whether probation officers would work happily with a system involving the cautioning of juvenile delinquents as in Liverpool. Again, the effect of the appointment of welfare officers to the Divorce Court, now given a statutory impetus by the Matrimonial Proceedings (Children) Act, 1958, is of importance but is very curiously considered (p. 155).

On the other hand, the methods used by the probation officer to assist and overcome the inevitable antagonism felt by the majority of probationers is very well brought out. This is particularly true of chapter three, which is illustrated by a number of cases to assist in the understanding of the value of probation. Finally, some excellent points are made in relation to matrimonial conciliation (chapter five), in particular a quotation from the *British Journal of Medical Psychology*: "It is permissible to assert that the practice of marital counselling, conciliation, etc., has remained technically on a level of *ad hoc* empiricism and is lacking a clearly formulated conceptual basis related to accepted theory" (p. 119).

To the reader not concerned with all the details of the Probation Service, this is an unduly prolix book; but it contains a great deal of interesting matter.

T. E. JAMES.

Books received:

The Jury is Still Out. By Irwin D. Davidson and Richard Gehman. London: Peter Davies. 1959. 303 pp. 21s. net.

In Some Authority. By Frank Milton. London: Pall Mall Press. 1959. 168 pp. 16s. 6d. net.

Readers' digest:

Criminology: The criminal psychopath: 228 *Law Times* 101, 118.
Evidence: Confessions: 228 *Law Times* 69.
Larceny: Reform of the law of larceny: 103 *Solicitors' Journal* 762.
Police: Identification parades: 67 *Police Review* 660.
Road traffic: Automatism and dangerous driving: 123 *Justice of the Peace* 518.
    Duty of motorist to stop and report: 123 *Justice of the Peace* 460.
    Notice of intended prosecution: 109 *Law Journal* 519.
    Restrictions on prosecution: 228 *Law Times* 149.
Sexual offences: The homosexual offender: 123 *Justice of the Peace* 480.
    Prostitution: 228 *Law Times* 137.
Trial: Fitness to plead: onus of proof: 103 *Solicitors' Journal* 781.

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THE
CRIMINAL LAW
REVIEW

December 1959

Police inquiry

As we go to press we welcome Mr. Butler's announcement that there is to be an independent inquiry into matters affecting the relationship of police and public. Neither the form of the inquiry nor its exact scope have yet been determined and it is to be hoped that the field it surveys is the widest possible.

Persons awaiting trial

The suicide on August 19 in Durham prison of a seventeen-year-old boy awaiting trial on two charges of indecency has focused attention on two problems of our present remand procedure The full facts have not been clearly stated in any one place, but the following versions have appeared.

First, the question of bail. When Elwes J. was told on October 20 that the youth, George John Butler, had committed suicide, he said:

> " This is a most dreadful thing. In a decent world an adolescent would not be prosecuted on a criminal charge arising out of a sexual offence. He would be handed over to some intelligent, sympathetic person who would help him out of his difficulties."

He went on to say:

> " Other people are to some extent responsible for this tragedy and I had better say no more. It is scandalous that a boy of seventeen should not be allowed bail where there are parents to look after him. I can't understand why bail was not allowed."

The full reasons for the refusal of bail are not known. At Durham Assizes Mr. R. A. Percy, who reported the facts on behalf of the Crown, said that his instructions were that he (Butler) had previous convictions and sureties could not be found. Butler's parents said afterwards that the police were twice told that sureties could be got. A police spokesman said that when Butler was committed from Consett Magistrates' Court and bail was refused he was told he could apply to a judge in chambers. This he did. His application was refused.

In the House of Commons on November 5, Mr. Dennis Vosper, the Joint Under-Secretary of State for the Home Department, in a debate arising out of this case and the lack of a remand centre in this area, said that the facts were that the boy had appeared before the magistrates' court several times and did not apply for bail or for legal aid on any of them. On all occasions his father was in court. He did apply to a judge in chambers for bail; the police opposed the application (Mr. Vosper did not reveal on what grounds) and it was refused.

From the reports published the full facts do not appear to have been put before the learned judge in court.

Mr. Vosper went on to say, however, that the question of length of time spent in custody by persons awaiting trial is a matter of some public concern. It is one of the subjects under consideration by the Streatfeild Committee on the business of the criminal courts.

The principal subject of the debate [1] on this case was the lack of sufficient remand centres in this and other areas. Mr. Vosper was able to promise that the second remand centre scheduled for building in the immediate future will be in this area.

Costs in criminal cases

We should like to draw our readers' attention to the Practice Note at p. 838, *post*, in which Lord Parker C.J. considers the question of the payment of costs out of local funds in cases where an accused person is acquitted. In a debate in the House of Lords on November 5 [2] Lord Parker said that he hoped that this direction would remove, or at any rate lessen, the rigidity shown by the courts in exercising their discretion under section 1 of the Costs in Criminal Cases Act, 1952. The Home Office, in Circular No. 135/1959, have also drawn attention to this Note.

It is hoped that the courts will now feel themselves more at liberty to order the payment of the costs of an acquitted defendant if justice so demands.

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[1] H.C. Debates, Vol. 612, cols. 1329 *et seq.*

[2] H.L. Debates, Vol. 219, cols. 430–431.

The Forensic Science Society

Following on the news of the formation of a British Academy of Forensic Science[3] we are informed of a decision to form a Forensic Science Society taken at a well-attended meeting held at Nottingham University on October 31. The object of the society is to further the study and application of forensic science in all its aspects. After the meeting, Dr. J. B. Firth, the newly elected president of the society, said that science must play an increasingly important part in the fight against crime now that criminals were becoming scientifically minded. It was essential that scientific evidence should be fully appreciated, and that the legal profession should be in a position to understand its significance. For that reason he thought that some instruction in forensic science should be incorporated in legal training. Senior detectives should also have more scientific training if criminals were to be convicted as well as caught.

The other officers of this society are: Vice-president, Dr. D. Patterson; Treasurer, Dr. A. Clift; Secretary, Dr. E. G. C. Clarke; and Editor, Mr. S. S. Kind. The committee includes two chemists, two pathologists, a biochemist, a biologist, a solicitor, a detective superintendent, and a police surgeon.

It is the intention of the society to arrange a series of symposia, to be held alternately in London and in the provinces. Among the subjects suggested for discussion are blood, hypoglycaemia, street accidents, and instrumentation.

Betting and gaming

The Government has introduced a Betting and Gaming Bill based on certain recommendations of the Royal Commission on Betting and Gaming, 1949–51. If the provisions of the Bill are passed in their present form, they will do much to bring our betting and gaming laws out of the disrepute in which they are generally held, and will also ease the task of the police in seeing that the law is complied with. Briefly, the provisions of the Bill are as follows.

Provision is made for licensed betting shops where cash betting will be legal. The use of premises other than racecourses and tracks and licensed betting offices as a place of resort for betting will continue to be illegal, and the penalties for street betting will be increased. The rules governing the conduct of licensed betting offices include a provision that persons under the age of eighteen are not to be admitted and forbid loitering either inside or outside the premises. The First Schedule lays down the procedure for the grant and renewal of bookmakers' permits, betting agency permits and betting office licences, including the grounds on which such permits and licences may be refused.

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[3] [1959] Crim.L.R. 683.

Part II of the Bill makes gaming lawful provided it is conducted in accordance with the rules laid down in the Bill, which provides, *inter alia*, that the chances of players must be equal and that no toll is levied on the stakes or charge made for participation: certain gaming machines are made legal, but gaming in the street or other public place is prohibited.

Part III makes lawful certain amusements with prizes.

The passage of this Bill through Parliament will undoubtedly be a stormy one. But these reforms are long overdue and it is to be hoped that they will be carried out.

Private prosecution in Scotland

In our Editorial comments on the Thurso Inquiry in April and May of this year we mentioned that, owing to the refusal of the Lord Advocate's concurrence, private prosecution was impossible. It has been drawn to our attention that there is an alternative method of bringing a private prosecution which does not require the concurrence of the Lord Advocate. This is procedure by criminal letters, under which prosecution may, with the consen of the High Court of Justiciary, be brought by a private citizen. It is, however, very rarely that resort has been had to this pro cedure in recent times. The most notable example is the case o *J. & P. Coats* v. *Brown*, 1909 S.J.(J.) 29.

Compensation for the victims of offences against the person

Among the Private Members' Bills introduced in the House o Commons on November 11 was the Criminal Injuries (Compensa tion) Bill. This seeks to compensate those injured by certai criminal offences against the person and to provide for thei dependants and for the dependants of those killed by criminal acts

We welcome this Bill with one reservation. Mr. Butler ha said several times in the past year that the Government are con sidering the question of compensating victims of violent crimes an have, in fact, set up an official working-party to examine in deta the proposals put forward by the late Miss Margery Fry and t see whether a workable scheme can be devised. It seems to u that it would have been better to wait until this working-party ha reported, and the Government had had an opportunity of actin on such report before introducing a private Bill.

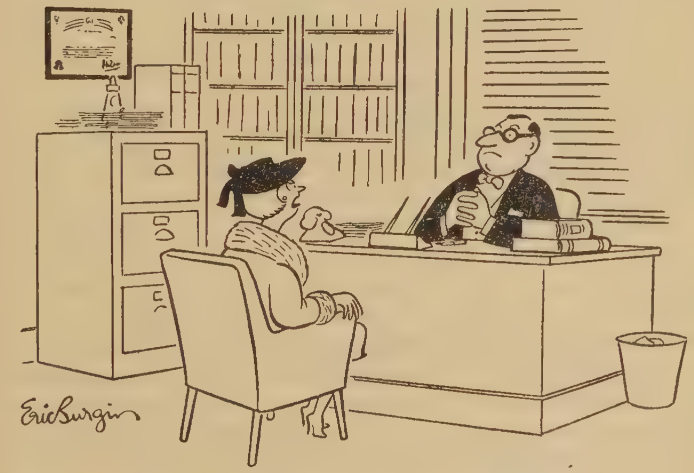
Other Private Members' Bills of interest to criminal lawyers are: Mock Auctions; Road Safety; First Offenders (Scotland); Road Traffic (Amendment); and Road Traffic (Driving of Motor-Cycles and Mopeds).

Judicial appointments

Sir Anthony Hawke, the new Recorder of London, has been appointed to exercise judicial functions.

His Honour Judge Aarvold, O.B.E., T.D., has been appointed Common Serjeant in the City of London Court in succession to Sir Anthony Hawke.

Maxwell Joseph Hall Turner, Esq., has been appointed an Additional Judge of the Mayor's and City of London Court.



"FACTS . . . FACTS . . . FACTS! Why keep asking for facts. Do you want to hear my side of the story or not?"

Prosecuting Officer

By Christopher Williams

Post-mortem with Portly

Offering up a silent thanks for his deliverance from the curious Pobjoy, Newman pushed through the door from the court into the office. Sergeant Green followed him, closing the door behind him. Newman glanced at the telephone, which was resting securely on its cradle. He raised his eyebrows, as he turned interrogatively to Green.

" Does the Superintendent want me to ring him back? " he asked. " Where was he speaking from? "

" Well, sir," replied Sergeant Green, with a conspiratorial air, " the fact is that he didn't ring at all. But I thought that Mr. Pobjoy might be getting you involved in one of his arguments, and I knew you were wanting to get away. Sort of white lie, sir, if you see what I mean."

" Very kind of you, Green," replied Newman. " As it happens, I do want to see Mr. Portly, so perhaps you'd be good enough to take a look into the court and see if the coast's clear."

Sergeant Green opened the door a fraction, and peered out. " All clear, sir. Mind you, Mr. Pobjoy's not half so bad as he makes himself out to be. Sort of lamb in wolf's clothing, if you get my meaning. But he does go on rather."

Nodding briefly to Green, Inspector Newman bustled back into the court and collected his papers. Then he made his way briskly out of the building into the Headquarters nearby. Soon he found himself knocking on Superintendent Portly's door.

" Come in," boomed the familiar voice. " Ah, there you are, Newman. Sit down. How did it go? The Collins case, I mean."

Newman sat down and placed his papers in an untidy heap on the desk in front of him. " Well, sir," he began, " they convicted him of dangerous driving and the halt sign offence."

" Did they, now? " commented Portly. " I'd have thought they might have taken them as alternatives, in much the same way as the dangerous driving and the careless driving are alternatives. Did they say anything about it? "

" No, sir," replied Newman. " I rather think the evidence came out in such a way as to let them think that the dangerous driving didn't consist solely in failing to halt, but also included what he did after failing to halt, accelerating and swinging round so as to get into a skid."

"Fair enough, Newman," said Portly. "Quite right too, when you come to think of it. No doubt you brought the point out nice and clearly in your opening, eh, Newman? But how did the evidence as a whole come out? Were there any snags?"

Alternative charges

Inspector Newman paused before replying. The old man didn't miss many tricks, to be sure, he reflected. He'd remember that point another time, anyway. "Before I come on to that, sir," he began, "there was one thing I was not too certain about." And he went on to describe the approach made by Pobjoy before the case was called.

"You see, sir," he ended by saying, "I didn't really know whether to accept the offer or not. Quite apart from anything else, I didn't know Pobjoy, and felt I ought to watch my step with him."

"Oh, old Pobjoy's all right, you know," replied Portly with a grin. "He's as good as gold, really. Of course, he puts on rather an act, trying to make himself out to be the crafty, ruthless type. But the plain fact is that he's just not very good in court, and so he tries to cover up whenever he finds himself handling a defence—which, I may add, isn't very often. Of course, he's not above a bit of quiet bullying, if he thinks he can get away with it. But I can assure you there are others you've got to watch far more carefully than him.

"But let's get to the point. As prosecuting officer, you wondered whether to make certain of things by accepting a plea on the lesser charge, and dropping the dangerous driving. The short answer is, no. If there's good evidence of dangerous driving, then go ahead on it. If there isn't, then we ought not to issue a summons for it. It's as easy as that."

"That's all very well, sir," replied Newman, with a puzzled frown. "But if that's all there is to it, then why are we justified in issuing a summons for the careless driving? Oughtn't we to make up our minds which it is to be, and go ahead on that one?"

"I suppose there's something in that," replied Portly. "In fact, I've got it at the back of my mind that the last Lord Chief Justice said something like that once. But it's not really practicable. Dangerous driving's such a funny sort of offence; so much a matter of opinion. I mean to say, our opinion may not coincide with the Magistrates'; what we say is 'dangerous' they may say is only 'careless.' So we add the charge under section 12, just in case."

"But surely that's taken care of by section 35 of the Road Traffic Act of 1935, isn't it, sir?" said Newman, secretly wondering whether he would be called upon to recite the section. He was a little disappointed when the Superintendent waved his hand airily, and said: "Oh, that. When the Magistrates' Court is summarily hearing a charge under section 11, but finds the charge not proved, then they can direct a charge under section 12 to be preferred and proceed to hear it. Why put them to the trouble? Why not put it in from the start? I mean to say, the chap may choose to go for trial on the dangerous driving, and then get acquitted. Where do you stand then?"

"Can't you just wait and see what happens at Sessions, and if he gets away with the section 11 charge there, issue a summons under section 12?" asked Newman.

"You could," replied Portly, "But you'd have to watch out for the six months' rule. A fly defendant could easily spin things out so that you'd be out of time. No, it's obviously best to bring the two charges right from the start. Then, if you fail on the section 11, you've got a chance on the section 12. If he elects to go for trial on section 11, then the careless driving charge can be adjourned *sine die*, and you can fix a date when the result of the trial is known—either to proceed on it if he's acquitted of the dangerous driving, or to withdraw it if he's convicted. If he chooses summary trial on the the section 11 charge, and is convicted, then you adjourn the minor charge, so that you've still got it available if he appeals successfully; or if he's acquitted at the Magistrates' Court on the dangerous driving charge, they can deal with it there and then. Look, there's quite a bit about it in the *Criminal Law Review*[1]—look it up sometime."

"Yes, I'll do that, sir," replied Newman. "But it doesn't really answer my original problem. What do I do if the defendant offers to plead guilty to careless driving, provided I drop the dangerous driving charge?"

"Generally speaking, Newman," said Portly, "you say no. I've already said that if I think the chap has driven dangerously, then he ought to stand trial for dangerous driving. It's not for you to qualify that decision. Of course, there may be times when circumstances justify accepting a plea of that kind, but you'll find that I'll have marked the papers accordingly. But it'll be my responsibility, not yours. Mind you, I'm not saying that in time you won't be experienced enough for me to leave it to you, but for the time being that's how it's to be. All right? "

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[1] [1954] Crim.L.R. 537; [1955] Crim.L.R. 239, 453.

"Yes, sir, thank you," replied Newman. Then he went on to describe the course of the hearing. When he came to the identification by Walker of Collins as the driver, he saw Superintendent Portly smile.

"You won't run that particular risk again, I hope, Newman," Portly said. "Just as well you remembered in time. I'd have soon been on your track if you hadn't. Mind you, it happens more often than you think, but often enough the Clerk steps in and tidies it up. But you can't afford to take the risk, you know. After all it's your job, not the Clerk's, to put the case for the prosecution. Anyway, go on."

The Judges' Rules

Then Newman came to P.C. Fouracre's evidence, and the interruption by Pobjoy. He described how he had dealt with the point raised by Pobjoy.

"Well, of course you were quite right, Newman," said Portly. "I've heard that argument so often—even among police officers. But, personally, I've never been able to follow it. The policeman's job is to find out what happened. The Judges' Rules specifically say he can put questions for this purpose. Obviously, there may be cases when, having built up a pretty good picture of what happened from statements made by the parties at the scene of an accident, the constable can see perfectly clearly that one or other of them is going to be summoned; of course, then he should think seriously about giving the caution. But not before. Mind you, there are some courts where it's the Clerk, and not defending solicitors, who won't let police officers give evidence of uncautioned statements made by the accused. Not in this county, though. And I'm pretty certain the Chief would sit up and take notice if they started that here. I mean, you sometimes get cases in which the accused man has said something on the arrival of the police officer, before he has any reason to caution him, which is an important piece of evidence. If the court refused to admit the statement, and dismissed the case because the rest of the evidence wasn't strong enough, there might well be grounds for asking for a case to be stated. And perhaps that would be the best thing anyway; then perhaps we'd get the thing settled once and for all. However, I agree it's a matter of opinion, and I know some forces take the opposite view to ours; and they're quite entitled to do so. Anyway, go on."

Newman passed quickly over the interest shown by Pobjoy in the "warning formula," and Fouracre's description of the force procedure. Then he came to the by-play between the Clerk and Pobjoy at the close of the case for the prosecution.

"I didn't quite get the point of all that, sir," said Newman." The Clerk seemed to be trying to stop Pobjoy saying his piece, but it was done in such a roundabout way. Why didn't he just tell him to carry on with his witnesses?"

Order of speeches

"Ah, now we're on to what they call the 'order of speeches,' Newman," replied Portly. "Let's first of all see what the legal position is, then we can see what the Clerk was up to. Rule 17 of the Magistrates' Courts Rules of 1952 sets the whole business out quite clearly, as far as summary trial of an information is concerned, where the accused pleads not guilty. There are five bits to the Rule. One, the prosecutor calls evidence for the prosecution, and before doing so can address the court. That's where you get the right to address the court, of course. Two, at the close of the case for the prosecution, the accused may address the court, whether or not he afterwards calls evidence."

"But, sir," began Newman.

"I know what you're going to say, Newman," went on the Superintendent with a wave of his hand. "But let me finish first, then we'll see. Three, after the evidence, if any, for the defence, the prosecutor may call evidence in rebuttal. You'll remember our discussing this business of rebuttal—it must be confined to a matter which arises unexpectedly in the course of the defence, and which no human ingenuity could have foreseen.[2] We needn't go into it again here. Four, at the conclusion of the evidence for the defence, if any, and in rebuttal, if any, the accused may address the court, either if he has not already done so, or with leave of the court, if the accused or any witness on his behalf has been called to give evidence. Five, if the accused does address the court a second time, then the prosecutor may address the court in reply."

"Well, according to that, sir," said Newman, "it doesn't seem to matter whether Collins or anyone else was going to be called for the defence or not. I mean, if Pobjoy had no intention of calling Collins or his wife, the question of a second address to the court did not arise. And if he was going to put Collins in the box, all he had to do was to ask leave of the court to address them a second time. I can't see why the Clerk was worrying."

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[2] *Price* v. *Humphries* [1958] 2 Q.B. 353.

" Neither can I, quite honestly," replied Portly. " If I were you, I should ask him some time. Of course, it's just possible that he was confusing summary trial with trial on indictment. They're rather different. On indictment, when the accused is represented, it makes quite a bit of difference whether or not evidence other than the accused is called. If it is, the accused's representative gets the right to sum up as well as opening his case. But if not, then he only has the right to sum up. But I shouldn't think that was the explanation; after all, the Clerk knows his job. More likely it was that he was trying to get it home to Pobjoy that if he addressed the court before calling any evidence he was going to call, then he would have to get leave of the court to make a second address. Perhaps the court would be unwilling to give leave, when the accused was represented; I wouldn't know. But in any case, if he insisted on addressing the court twice, he would be giving you the right to address the court in reply. Maybe Pobjoy saw the red light, and came to the conclusion he didn't want to give you the chance of having a go at him. Maybe you'd scared him."

" But all the same, sir," said Newman, " I don't see why the Clerk should have bothered. I mean, it's no more his job to keep the defence out of trouble than the prosecution."

" I don't know, Newman," replied Portly. " Maybe he has a soft spot for old Pobjoy. More likely, he had his eye on the clock, knowing how long-winded Pobjoy can be when he gets going; one speech was bad enough, without running the risk of two. At all events, now you know all about the order of speeches. If Pobjoy had opened his case, and had still managed to address the court again at the end of it, you'd have had the right to say a few words when he'd done."

" And would that have been a good idea, sir? " asked Newman doubtfully.

" That would depend entirely on the circumstances," replied Portly. " I mean to say, if you felt the defence had been entirely fair, and had confined themselves to putting the case as it appeared to them, you'd do much better to keep quiet. Never get on your feet without a good reason. But if you felt they'd been grossly unfair, and had drawn perfectly unjustifiable inferences from the evidence, or had twisted the meaning of the prosecution evidence in an unfair way, or had made unsupported imputations against the prosecutor, then you'd be perfectly entitled to step in and put things right. In a dignified way, of course; never give the impression of wrangling with the defence. On the whole, though, I'd advise you to leave it entirely alone, at any rate until you're more experienced. After all, the Clerk's no fool. If you watch him carefully, you'll soon be able to see whether he's swallowing anything of that sort. If you see he's weighed it up all right, then leave it to him. Never kick an open door."

" I see, sir," replied Newman. " It would depend anyway, as far as this Collins case was concerned, on what Pobjoy had had to say in addressing the court, and that would depend on how Collins had fared under cross-examination."

" Precisely," replied Portly.

Competence and compellability of defendant's wife

" All right, sir," replied Newman, with a sigh of relief. " that brings me to the next point." And he went on to describe the various references to the defendant's wife. " Pobjoy seemed to want it all ways, sir," he said. " What was the position about her? " Could we have called her if we'd wanted to? And if so, was there any special reason why we didn't? "

" Well," replied Portly, " in the first place, let's see if we could have called her. In other words, whether she was (a) a competent, and (b) a compellable witness. Well, the basic position is that the wife of an accused person is a competent witness for the defence only. But to this rule there are two exceptions. First, the prosecution can call her without the accused's consent in certain cases laid down in the Schedule to the Criminal Evidence Act of 1898—they include cruelty to children and certain sex offences, among others. Secondly, there is an old common law rule which makes the wife competent and compellable when her husband is charged on indictment with inflicting personal injury to his wife, and in certain other cases. Otherwise, the prosecution cannot call her. Now, Collins may be said to have inflicted personal injury to his wife; but he certainly wasn't being tried on indictment. So, as far as the summary trial was concerned, she wasn't competent or compellable. That was why she wasn't shown as a witness—though I think you'll find that a statement was taken from her."

" But Collins might have elected to go for trial on the dangerous driving charge," said Newman. " We didn't know that before the case came on."

" No, but if he had done, we could have dealt with her evidence by way of additional evidence—serving copies and so on," replied Portly. " But even then, I'm not at all sure that a charge of dangerous driving which caused personal injury to the wife is quite the same thing as an indictment for causing personal injury. That would have to be a matter for legal advice. I rather doubt it, myself. In any case, even if her injuries were thought to be serious enough to be included in this common law exception—she wasn't very badly hurt, you know—her evidence didn't add much to our case. As far as I remember, all she said was something to the effect that she told her husband to take care or something."

"She could have been asked about all those parked cars, dogs, sun in the eyes, following cars and so on, couldn't she?" asked Newman.

"Yes, but I don't imagine the court would ever accept all that stuff, if he'd never mentioned it to the constable at the time," replied Portly.

"No, I suppose not, sir," said Newman. "But then what was Pobjoy trying to get at, talking about her injuries and so on?"

"Oh, as to that," replied Portly, "I imagine he was trying to have his cake and eat it. I mean, he may have been trying to imply that the prosecution was weak because you didn't call an eye-witness; if you'd said that she wasn't competent he might have tried to show that she was competent and compellable because of her injuries, but still you'd thought it best to keep her version out of it. On the other hand, if the court showed signs of turning the argument round on him, by concluding that, because *he* hadn't called her, it meant that her evidence was damaging to Collins, he'd be able to say that it was such a pity that her injuries were so severe that she couldn't be in court. It's awfully difficult to follow the way a chap like that thinks. Anyway, I shouldn't worry about it. Did you get a chance of getting out of Collins the fact that her injuries were not serious?"

"Yes," replied Newman. "In cross-examination. I thought I'd better do that."

"You were quite right, of course," said Portly. "You can now see that you killed two birds with one stone. On the one hand, you disposed of any suggestion that she was competent and compellable by reason of her injuries; and on the other you left it to the court to conclude that she was physically able to come to court, and that the reason Pobjoy didn't call her was that he knew her evidence wouldn't help him. No, that was quite properly dealt with. Is that clear now?"

"Yes, thank you, sir," replied Newman. "Excepting for one thing. When Fouracre went over to Mrs. Collins by the side of the road, she said something about she'd told him to watch out for the main road. When he gave his evidence in chief, Fouracre never mentioned that, though it was in his statement. I wondered at the time whether to ask him about that, but decided not to. Should I have done so?"

" Well, I don't quite remember the facts," replied Portly. " Where was Collins at the time? Was the remark made in his presence and hearing? "

" Yes, he was standing right beside her," said Newman.

" Well in theory, then, Fouracre could perhaps have given evidence of it," replied Portly. " But I think it would have been a mistake all the same. As a general rule, we oughtn't to give secondary evidence if the original evidence is available. I know that in this case the original evidence, that is, Mrs. Collins herself, was not available to us, but at the same time it looks a little near the wind to take advantage of that. There's another thing—I don't quite know whether privilege mightn't come into it—communications during coverture and so on."

" But that refers to communications between spouses, doesn't it, sir? " said Newman. " This was a communication made by one spouse to a third party. And since it was made in the presence and hearing of the accused, surely it was admissible? "

" Why didn't you get it out of Fouracre, then, Newman? " asked Portly.

" I don't know, really, sir," replied Newman. " I suppose I felt it was not quite the thing."

" There you are, then," said Portly. " And a very good reason too. Now, was there anything else, before I get off? "

Previous convictions

" Only one thing, sir," replied Newman. And he told of how he had stopped Pobjoy falling into the trap of letting Collins put his character in issue by talking about his long experience of driving. " I nearly forgot about those convictions," he said.

" But you remembered in time," said Portly. " It must have been obvious that Pobjoy knew nothing of Collins's record—those convictions were miles away from his home ground. Pobjoy clearly knows the value, with a lay Bench, of a clean record going back many years, not so much in avoiding conviction but in lessening the penalty. He was only trying to do his best for his client. You should have tipped him off much earlier, though. But if you'd forgotten all about it, until too late, I would think it much the best not to cross-examine Collins about them just because his character had slipped into issue. That would soon earn you a reputation you'd take years to live down.

" Well, Newman," went on Superintendent Portly, " I think that's about enough for now. I've got to get away. So off you go."

Inspector Newman, scooping his papers together, started off towards the door.

"There's just one thing, Newman," said Portly as Newman's hand rested on the doorknob. Newman stopped and turned towards the Superintendent. As he did so a cascade of papers poured from under his arm. He stooped to gather them together again, feeling the blood mount to his cheeks as he did so.

"What is that, sir?" he asked as he straightened his back, the papers gripped securely this time.

"I don't think anything at all of the way you prepare and keep the papers. All over the shop. One of these days you're going to be looking for a statement or a report or something, and you'll not find it—not because it's not there, but because it's tucked behind something else. Still, we'll leave that just now. We'll go into it another time."

Binding Over Witnesses

By G. M. Nightingale

Deputy Clerk to the Southampton Justices

> "A magistrates' court acting as examining justices shall bind each witness examined before it . . . by a recognisance to attend and give evidence before the court of assize or quarter sessions before which the accused is to be tried . . ."
>
> (Magistrates' Courts Act, 1952, s. 5 (1).)
>
> "Every recognisance under section 5 of the Act shall be in the prescribed form and shall be acknowledged by the person entering into the recognisance and signed by one of the justices before whom it is entered into."
>
> "As soon as practicable after taking such a recognisance as aforesaid the court shall give notice to the person bound by the recognisance."
>
> (Magistrates' Courts Rules, 1952, rules 2 & 3.)

Those are some of the rules of the game, known as "Binding over Witnesses." Approached in a proper light and with dignity the binding over is solemn and effective. The court usher stands behind the witness to prod him if necessary and the prisoner and gaoler look on with appreciation. The prosecuting solicitor looks in his file for the name of the next witness and the depositions clerk puts another bank of paper into his typewriter. With the help of the usher the witness generally consents to be bound over even when the clerk of the court, after reading aloud the deposition for some twenty minutes, is brief and hoarse. The attitude of witnesses towards being bound over varies very slightly. The people of this country are generally law abiding and the good witness, having had thrust at him the full weight of his solemn recognisance which is stayed, as it were, within a few inches of his face, is only too pleased to say yes and escape this final uncertainty of the witness box. Very few witnesses ask what it means and this is a good thing because no ready explanation is to hand. If the jovial clerk is there he tells the witness that it is a one-sided bet of £*x* that the witness will be present to give evidence at the next court of quarter sessions. If the official is the deputy clerk he starts telling the witnesses about promises to pay if . . . The first assistant prefers the penalty formula. Almost as bad as the inquiring witness is the honest fool who asks: "Do I have to pay now?" With a quick show of generosity this witness can be disposed of with a brief: "No, only if you fail to attend" and if properly put this will leave the witness with a feeling that he has been very well treated. The worst witness one may meet is he who says with honesty: "I am not worth £*x*." His undertaking is valueless, but his admission makes his promise to attend more weighty. In all such cases the final sanction of imprisonment is one to which the court is loth to have recourse.

Between reading out depositions and taking recognisances, the clerk who has already completed his list of witnesses and exhibits, may then draw up a notice of recognisance for the witness then giving evidence. Treading gently amid the alternative places of trial and natures of the binding over on the form before him, he can listen to the evidence with that half ear which is just sufficiently acute to pick up an objection after the evidence has reached paper. The form of recognisance, which shows in its completed parts evidence of an irascible hand—and that is what writing completed beside a typewriter always seems to be—can then be handed to the witness, who is then hustled from the court before he can point out that the form is useless to him because it doesn't tell him the day and time of the next quarter sessions.

Alack, this is not the end of the story because the Recognisance of the Prosecutor and Witnesses must be prepared and forwarded to the superior court, as must the list of witnesses bound conditionally.

Having mentioned a few of the duties of committing justices in this connection, the amount of work involved becomes apparent. From the point of view of the higher courts a recent request from some that the depositions of witnesses bound conditionally be so marked, indicates that the arrangements are not as convenient as they might be.

From the police point of view the recognisance is, in many forces, virtually ignored. It is neither a help nor a hindrance to them. If the notice of recognisance is to be served personally after the committal proceedings, it may mean a loss of police time. Otherwise, and I can speak for only one large force in this connection, the officer in the case sees, or writes to, the witness and tells him on what day to appear. At assizes, the case may be called on weeks after Commission day and the attendance of the witness on that day would be unnecessary. The witnesses are invariably agreeable to attend when directed and never raise the point that by obeying the verbal direction of a police officer they are liable to forfeit their recognisance for failure to appear on the advertised date of quarter sessions or assize. Indeed, if a special court is arranged, witnesses willingly attend for that special court without querying the terms of the recognisance. Likewise, if through illness or absence of the accused the trial is to be adjourned, witnesses gladly accept a notice or message that they need no longer attend.

From the point of view of the clerk to the justices, the recognisance and the notices are just obstacles in the path of speed at a time when every effort is being made to deal with increasing work.

While one does not wish to cast a slur on what was once a valuable and solemn step in the enforcement of justice, it does appear now to have outlived its usefulness. Were every witness to be told on the authority of an Act of Parliament: "You must attend the court to which the accused is committed or at such time and place as the police direct and if you fail you may be fined £*x*," they would understand the warning and the present police procedure would be correct. If at the end of each deposition the words, "Warned" or "Warned Conditionally" were placed above the justice's signature and a simple list of witnesses, with the nature of the warning given, supplied to the higher court, then the necessary information would be more easily available to that court than it is now.

Misprisions, Compoundings and Compromises

By C. Howard, LL.M.

Lecturer in Law in the University of Queensland

[*Continued from p.* 758, *ante*]

Compromises

Felonies

It follows from the existence of the crime of compounding a felony that an agreement to discontinue or refrain from prosecuting a felony is illegal and void, and there is no reported case in which such an agreement has been upheld.[49] It is not necessary that the agreement should be expressed: in *Jones* v. *Merionethshire P.B.S.*,[50] relatives of an employee of the defendants who was threatened with prosecution for embezzlement entered into a financial arrangement with the defendants, as a result of which no prosecution took place; it was held that in the circumstances it was clearly an implied term of the arrangement that the defendants should not prosecute.[51] On the other hand, if the parties come to an agreement as a result of which the would-be prosecutor is influenced not to prosecute, it does not follow that the agreement is necessarily illegal. The court must be able to find that abstention from prosecuting formed part of the agreement. Thus in *Haywood* v. *Whitaker*[52] the wife of a debtor, who had already been given into custody by his creditor with a view to prosecution, procured her husband's release by voluntarily furnishing security for the debt out of her separate property. Although the result of her agreement with the creditor was that he did not prosecute, this formed no part of the agreement itself, and her undertaking was enforceable accordingly. In *Flower* v. *Sadler* it was said that the use of strong language in threatening to prosecute does not of itself make a subsequent agreement, as a result of which there is no prosecution, illegal; but clearly it will be a factor to be taken into account. In this connection it will be recalled that even if an agreement is not illegal as a compounding of a felony, it may be unenforceable under the equitable doctrine of unfair pressure if it has resulted from threats to prosecute.[53]

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[49] In addition to cases cited below, see *Andrews* v. *Eaton* (1729) Fitz-G. 73; *Wallace* v. *Hardacre* (1807) 1 Camp. 45; *Harding* v. *Cooper* (1816) 1 Stark. 467; *Fivaz* v. *Nicholls* (1846) 2 C.B. 501; *Rowland* v. *Simons* (1850) 15 L.T.(o.s.) 231; *Rawlings* v. *Coal Consumers' Assn., Ltd.* (1874) 43 L.J.M.C. 111; and *Andrews* v. *Southwart* (1885) Diprose and Gammon 73.

[50] [1892] 1 Ch. 173. See also *Ward* v. *Lloyd* (1846) 6 Man. & G. 785, and *Brook* v. *Hook* (1871) L.R. 6 Exch. 89.

[51] It may be noted that although an officious bystander might well have implied this term, it could hardly be said to have been necessary to give the transaction business efficacy.

[52] (1887) 3 T.L.R. 537. See also *Ward* v. *Lloyd*, above, and *Flower* v. *Sadler* (1882) 10 Q.B.D. 573.

Most of the cases illustrate the position where, the prosecution having been discontinued, the erstwhile prosecutor seeks to enforce the agreement against the other party. *Re Mapleback*[54] provides an example of an attempt to upset the agreement after it had been completely executed. M. forged B.'s signature to a bill of exchange. When the bill fell due M. confessed to B. and asked B. to meet the bill to save him from ruin, offering in return a bill of sale over all his property. B. agreed to this and in due course recouped himself out of a sale of M.'s property. M. then became bankrupt, and his trustee in bankruptcy sought to recover the proceeds of the sale from B. It was held that, although B. might have found himself in grave difficulty had he been plaintiff instead of defendant, yet, since there had been no breach of the bankruptcy laws, and M.'s trustee in bankruptcy could have no better claim against B. than M. would have had, the parties were *in pari delicto* and the trustee was not entitled to recover.[55]

Since the crime of compounding is constituted by the agreement not to prosecute, it follows that anything which happens after agreement has been reached is irrelevant. Therefore the agreement loses none of its illegality if the prosecution sought to be stifled nevertheless takes place,[56] or if the accused is not only prosecuted, but acquitted.[57] *A fortiori*, it is not incumbent upon the court to take any notice of an agreement to withdraw a prosecution of which it is seised.[58]

Misdemeanours

The law on agreements not to prosecute misdemeanours is less clear. The modern rule, laid down in *Keir* v. *Leeman*[59] and affirmed in *Windhill* v. *Vint* [60] is supposed to be that a distinction must be drawn between so-called public offences, or offences of a public nature, and private offences. The former, it is said, may not be compromised; the latter may. In *Keir* v. *Leeman* the plaintiff had previously sued one of the defendants and recovered judgment. When a constable tried to execute *fi. fa.* on behalf of the plaintiff he was impeded by the defendants. The plaintiff thereupon indicted the defendants for rioting, assaulting the constable, and obstructing the constable in the execution of his duty. Before trial the plaintiff agreed with the defendants not to proceed with the indictment in consideration of their paying the balance owing under the original judgment and the costs of the prosecution. This compromise was approved by the court and the prosecution was not proceeded with. The defendants defaulted and the plaintiff sued them on the agreement. He failed on the ground that the agreement upon which he relied was illegal as being an agreement to stifle a prosecution for an offence of a public nature. The judgment of the court was delivered by Tindal C.J. He first drew attention to a conflict of authority. Some cases [61] had appeared to lay down the rule that it was lawful to compromise a misdemeanour, although not a felony. Others,[62] however, had established the stricter rule that even a misdemeanour could not be compromised if it "was for a public misdemeaour and not for a private injury to the prosecutor." [63] This rule was to be preferred, the cases which had proceeded on the distinction between felony and misdemeanour being objectionable in as much as they "overlooked the consideration [in public misdemeanours] that a defendant who had infringed a public right was thereby entirely freed from the punishment due to a violation of public law." [63a] The judgment concluded: "We have no doubt that, in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit. It is said, indeed, that in the case of an assault he may also undertake not to prosecute on behalf of the public. It may be so: but we are not disposed to extend this any further.

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[53] *Williams* v. *Bayley* (1866) L.R. 1 H.L. 200; *Dewar* v. *Elliott* (1824) 2 L.J.(o.s.)Ch. 178.

[54] (1876) 4 Ch.D. 150.

[55] Contrast *Re Campbell* (1884) 14 Q.B.D. 32, where there was a breach of the bankruptcy laws and the trustee was able to recover.

[56] *Burgess* (1885) 16 Q.B.D. 141; *Daly* (1840) 9 C. & P. 342.

[57] *Ex p. Brookes* (1822) 1 Bing. 105; *Ex p. Critchley* (1846) 3 Dow. & L. 527.

[58] *Wiltshire JJ.* (1863) 8 L.T. 242; *sub nom. Ex p. Bryant*, 27 J.P.Jo. 277.

[59] (1846) 9 Q.B. 371.

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[60] (1890) 45 Ch.D. 351.

[61] *Johnson* v. *Ogilby* (1734) 3 P.Wms. 277; *Drage* v. *Ibberson* (1798) 1 Esp. 643; *Fallowes* v. *Taylor* (1798) 7 Term Rep. 475; *Elworthy* v. *Bird* (1825) 2 Sim. & St. 372.

[62] *Edgcombe* v. *Rodd* (1804) 5 East 294; *Pool* v. *Bousfield* (1807) 1 Camp. 55. Reliance was also placed on *Beeley* v. *Wingfield* (1809) 11 East 46, and *Baker* v. *Townshend* (1817) 1 J.B. Moore 120, but in these cases there had been a prosecution to conviction before any compromise was reached. *Cf. Roxburgh* (1871) 12 Cox 8.

[63] 9 Q.B. 394.

[63a] *Ibid.*

"In the case before us, the offence is an assault coupled with riot and the obstruction of a public officer. No case has said that it is lawful to compromise such an offence.

"Nor do we think that the assent of the judge was material."[64]

At first sight it may be difficult to reconcile the dictum that a private misdemeanour, such as an assault, may be compromised even though it contains a public element, with the decision that this particular assault might not be. The explanation appears to be that here the prosecutor was not the person assaulted, and that to assault a constable in the execution of his duty is a wholly public offence unless the constable is prosecuting in a private capacity. But this is not the only difficulty. The question at issue in the case was the extent to which it is lawful to compromise a prosecution. The first part of the judgment appears to lay down the rule that it is lawful to compromise prosecutions for private misdemeanours but not for public ones. There then comes the incontrovertible, but hardly relevant, statement that one can always settle an action for damages, a civil remedy, even if the crime which gives rise to this right of action contains a public element. This is followed by the curious remark that it is said that in the case of assault one may not only compromise one's civil action, but also the prosecution, which is supposedly undertaken on behalf of the public at large. The implication is that this rule, the existence of which is neither confirmed nor denied, but merely adverted to as a possibility, is confined to assaults. But if this is so, the previous discussion of public and private rights is irrelevant. A further oddity is the dismissal of the consent of the trial judge to the compromise as immaterial. One would have thought that the consent of the judge, who can if he wishes insist on the trial continuing, was highly material to the legality of an agreement not to continue it. The attitude taken is that the agreement as such is not before the trial judge, but merely the decision whether the prosecution should properly be discontinued.[65]

This is brought out by cases in which the parties to a prosecution have been allowed to refer their differences to arbitration, the criminal proceeding being brought to an end by the entry of a formal verdict of acquittal. An example is *Hardey*.[66] There were two indictments at Nisi Prius for misdemeanour, one for perjury and the other for conspiracy. The background to the case was a partnership which had broken up and had already led to proceedings in Chancery. At the trial, on the advice of counsel, the parties agreed to verdicts of acquittal being entered, and no evidence was offered. The judge acceded to this course and entered the verdicts. The parties further agreed, also on the advice of counsel, to submit their outstanding differences to arbitration, and an order of the court to this effect was made. After a few attendances before the arbitrator the defendant revoked his submission. The present proceedings were then brought before the Queen's Bench on a motion for attachment of the defendant for contempt of court, or, alternatively, to set aside the verdicts and issue a writ of *procedendo*. The first point decided was that the court had no power to set aside the verdicts. Secondly, the defendant was not in contempt because a submission to arbitration could be irrevocable only if made under statute,[67] and the order at Nisi Prius was not so made. The court made some interesting observations on the validity of this order. First, it had purported to refer, *inter alia*, " the several indictments " [68] between the parties. It was held that the indictments could not be so referred because the prosecution had been concluded by the entry of the verdicts. But even if the verdicts had not been entered, the indictment for perjury could not legally have been referred. As to the conspiracy charge, out of deference to the decision in *Bardell*, in which an indictment for conspiracy had been referred,[69] the court would not say in so many words that it could not be referred, but they were clearly of opinion that it should not be. In other words, the misdemeanours of perjury and conspiracy cannot be compromised. For the correct general rule the court turned, not to *Keir* v. *Leeman*, but to *Baker* v. *Townshend* [70]: " Where a party injured has a remedy by action as well as by indictment, nothing can deter such party from referring the adjustment of the reparation which he is to receive to arbitration, although a criminal prosecution might have been commenced." To this the court would have added " with leave of the court." It seems to be clear that so far as the court in *Hardey* was concerned, no offence could be compromised; and this inference is strengthened by an express finding [71] that the negotiations between the parties had not amounted to " a corrupt agreement to stifle the prosecutions." As to the distinction between an agreement not to prosecute, to which the judge's consent is immaterial, and the termination of the prosecution, to which it is essential, the court observed that another ground for doubting the validity of the order at Nisi Prius was that the differences between the parties other than the indictments themselves were not before the court. Therefore it was difficult to see how the court could refer them.[72]

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[64] *Ibid.*, 395.

[65] *Cf. Garth* v. *Earnshaw* (1839) 3 Y. & C.Ex. 584, where a wife had agreed to discontinue a prosecution for assault against her husband in return for separate maintenance. This arrangement was both in respect of a private assault and made with the consent of the court, but it was nevertheless held illegal. In *Keir* v. *Leeman* (p. 391) counsel suggested that the case turned on the relationship of the parties, but it is hard to see how this could be relevant to the point at issue.

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[66] (1850) 14 Q.B. 529. See also *Bardell* (1836) 5 A. & E. 619, and *Baker* v. *Townshend* (1817) 1 J.B. Moore 120 (where, however, the verdict was guilty, and, needless to say, had not been consented to).

[67] The relevant statutes were 9 & 10 Will. 3, c. 15, and 3 & 4 Will. 4, c. 42.

[68] 14 Q.B. 540.

[69] Presumably the effect of referring an indictment to arbitration is to render it competent to the arbitrator to impose terms upon which the indictment shall not be proceeded with. The effect would, therefore, be the same as allowing the parties to compromise on their own terms.

[70] 14 Q.B. 541, quoting 1 J.B. Moore 120, 124.

In 1865 came *Clubb* v. *Hutson*,[73] in which it was decided, to quote the headnote, that a " promissory note given in consideration of the payee's forbearing to prosecute a charge against the maker, of obtaining money by false pretences, is illegal, and cannot be enforced." *Keir* v. *Leeman* was expressly followed. At this point, therefore, it was a fair inference that, subject to a doubt about assault, no prosecution could lawfully be compromised. Although lip service was being paid to the distinction drawn between public and private misdemeanours, in practice the judges were finding a sufficient public element in each misdemeanour which came before them to vitiate any compromise.

This position was disturbed in 1875 by *Fisher* v. *Apollinaris*.[74] The defendant company had previously prosecuted the plaintiff company under the Trade Marks Act, 1862, for the misdemeanour of infringing trade mark. Pursuant to an agreement between the parties, no evidence was offered at the trial and a verdict of not guilty entered. In return the plaintiffs gave to the defendants a letter of apology and authorised them to make such use of it as they saw fit. The defendants proceeded to publish this letter in advertisements in the daily press for nearly two months, thereby adversely affecting the plaintiffs' trade. Fisher & Co. responded by filing a bill asking that the defendants be restrained from further publication on the ground that the agreement under which they did so was illegal as an unlawful compromise of a prosecution, to which the plaintiffs assented only under threat of criminal proceedings. The action failed on the ground that the agreement was not unlawful. The reason assigned for this surprising decision was expressed by James L.J. in the following words[75]: "This is one of those misdemeanours where the person injured has the choice between a civil and a criminal remedy. It was no more a violation of the law to accept an apology in such a case than it would be to compromise an indictment for a nuisance or for not repairing a highway on the terms of the defendants agreeing to remove the nuisance or repair the highway. Offences of this kind are indictable, but it is not against our law to allow the injured person to enter into a compromise with regard to them." Very little authority was cited to the court, and that little did not include *Keir* v. *Leeman*. The dictum as to compromising indictments for public nuisance cannot stand with the later case of *Windhill* v. *Vint*,[76] and to the extent that the decision relied on the analogy of public nuisance it is unsound. But there remains the suggestion that a criminal prosecution can be compromised if it is in respect of a misdemeanour for which a civil action is an alternative remedy.

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[71] 14 Q.B. 541.
[72] 14 Q.B. 542 and 543–544. *Cf. Harries* v. *Thomas* (1836) 2 M. & W. 32.
[73] (1865) 18 C.B.(N.S.) 414.
[74] (1875) 10 Ch.App. 297.

Now clearly criminal and civil proceedings are alternative remedies in one sense wherever someone suffers damage or injury through a misdemeanour. It may be that the court, not having had its attention called to the earlier authorities, was intending to affirm the general proposition, hardly supportable by that time, that in any such case a prosecution could lawfully be compromised.[77] But it seems more probable that something turned on the particular type of misdemeanour. The offence was created by the 1862 Act[78] as an additional means of enforcement: apparently the legislature did not consider the existence of civil remedies to be a sufficient guarantee that the statute would be observed. The argument of the court, one is led to suppose, was that where there was evidence that the statute was being enforced it was immaterial which method was adopted. It is hardly necessary to point out, first, that this argument could be applied to any misdemeanour, or at least to any statutory misdemeanour, involving civil damage; and second, that the mere existence of alternative remedies provides no logical foundation for confusing their incidents. There remains the possibility that their lordships, contrasting "alternative" with "cumulative," had in mind the case where the employment of the criminal remedy barred the civil remedy, as in the oft-quoted example of assault.[79] Unfortunately for this argument the Trade Marks Act, 1862, expressly saved civil remedies from such a fate.[80] It is submitted that it would not be safe to rely upon *Fisher* v. *Apollinaris* for any proposition extending beyond its own special facts.

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[75] 10 Ch.App. 302.

[76] (1890) 45 Ch.D. 351.

[77] Mellish L.J., at p. 303, made the interesting remark, "Such compromises are constantly made before criminal courts in cases of assault or libel." It would have carried greater weight, however, if he had been able to say also that such agreements were constantly upheld in the civil courts. The practice of instituting criminal proceedings for private libel seems to have died out. Assaults are a special case and are considered further below.

[78] Mellish L.J. at p. 303.

This submission is strengthened by *Windhill* v. *Vint*.[81] The plaintiffs were a local authority who had previously indicted the defendants for interfering with and obstructing a public road. At the trial a compromise was approved whereby the defendants covenanted to repair the damage to the road within seven years, whereupon the plaintiffs would consent to a verdict of not guilty being entered. In the meantime the verdict was suspended.[82] The defendants disregarded the agreement and the plaintiffs now sued on it. The action was dismissed at first instance by Stirling J. and on appeal this decision was upheld. *Keir* v. *Leeman* was accepted as correctly stating the law as to public misdemeanours. That being so, there was no difficulty in holding the present agreement illegal, for a public nuisance was clearly a misdemeanour of a public nature. Stirling J. gave *Fisher* v. *Apollinaris* careful consideration and expressly dissented from James L.J.'s remarks, finding them irreconcilable with the judgment in *Keir* v. *Leeman*. This part of his judgment was not adverted to in the Court of Appeal but, since he was upheld in the result, must be taken to have been approved *sub silentio*.

It is easy to over-estimate the effect of the decision in *Windhill* v. *Vint*. The only question before the court was whether an indictment for a public nuisance could be compromised. Cotton L.J. expressly disclaimed any intention of dealing with the general question whether any prosecution could be compromised.[83] Fry and Lopes L.JJ. similarly confined themselves to ascertaining the rule applicable to the particular type of misdemeanour before them. Therefore, although the case clearly establishes the rule that public misdemeanours cannot be compromised, it does nothing to help the suggestion that private misdemeanours can be. If anything, the judges' researches into "the reason of the rule" tend the other way. It was said[84] that a contrary rule "would be the case of persons taking into their own hands the determining what ought to be done; and that ought not to be taken into the hands of any individuals, even if they are a *quasi* public body like the plaintiffs here, but ought to be left to the due administration of the law, and to the judges, who can determine in the particular case what ought to be done." Manifestly, the same reasoning can be applied to every prosecution.

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[79] Offences against the Person Act, 1861, s. 45.

[80] s. 11.

[81] (1890) 45 Ch.D. 351.

[82] Apparently on the authority of *Incledon* (1810) 13 East 164.

[83] 45 Ch.D. 362: "I do not intend to enter at all into the question whether an agreement to stifle any prosecution is illegal or not."

The heyday of compromised prosecutions came to an end in England with *Windhill* v. *Vint*, but the Australian case of *Kerridge* v. *Simmonds*[85] in 1906 should be noticed. S., a married woman, had been cohabiting with her lover K. K. uttered a remark in respect of which S. took out a complaint for criminal slander. Later on the same day the parties decided to live apart and entered into an agreement under seal whereby, *inter alia*, K. was to pay S. maintenance and S. was to withdraw her complaint. S. sued for arrears of maintenance and one of the defences put forward was that the agreement was an illegal compromise of a criminal proceeding. The High Court found for the plaintiff,[86] basing the decision squarely on the doctrine of *Fisher* v. *Apollinaris* that where the law allowed the injured party "either to prosecute or to sue for damages"[87] there could be no social harm in permitting the compromise of a prosecution. The reasons against this view of the law have already been stated, but *Kerridge* v. *Simmonds* may be authority for the proposition that a prosecution for the misdemeanour of criminal libel can be lawfully compromised. A ground of distinction where English law is concerned is that on its facts *Kerridge* v. *Simmonds* was a case of slander, which is not a crime in England.

Conclusions

As far as authority goes, therefore, the following points emerge. First, a felony cannot be compromised. Second, a misdemeanour of a public nature cannot be compromised. Third, the only misdemeanours which the courts have shown any inclination to regard as private for this purpose are assault, conspiracy and libel. As to libel, the only authority clearly in point is an Australian decision inapplicable on its facts to English law. As to conspiracy, there is only *Bardell*.[88] It is submitted that in view of the developments in the law since 1836 this case would not be followed at the present day. There remains assault, as to which there has been a fairly consistent body of opinion [89] that compromises are permissible. At first sight it is not obvious why assaults should be put into a class of their own in this respect. Certainly they are private rather than public, in the meanings which those words have acquired in this part of the law, but so are many other misdemeanours. It is not enough to say that assault is peculiar in that it can never be public, for *Keir* v. *Leeman* decided that an assault on a constable acting in the course of his duty is a public assault. It is submitted that the answer lies in the rule that a civil action for assault cannot be brought after a summary prosecution to verdict on the same facts.[90] Assault is the only important offence to which such a rule clearly applies. It is obvious that where a prosecutor, who may well have acted hastily or without proper advice, institutes criminal proceedings which will probably [90a] deprive him of his civil remedy, there is a case for allowing a compromise of the prosecution which does not apply elsewhere. It is therefore submitted that prosecutions for assault may be compromised.

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[84] Cotton L.J. at p. 363.

[85] (1906) 4 C.L.R. 253.

[86] In no uncertain fashion: "I am glad to find that, in spite of the industrious search of counsel for the appellant, no case has been found which obliges us to hold that which is against common sense" (Higgins J. at p. 263). All three judges thought the law was clear. *Cf. Chicken* v. *Ham, Uncommon Law* 71; but fortunately all the members of the High Court survived the hearing.

[87] Griffith C.J. at p. 260.

The next question is whether the same reasoning applies to any other offence, *i.e.*, whether there are any other similar bars to civil proceedings. The answer is not altogether clear. There are several relevant statutes, which will now be examined.

Bars to Civil Proceedings

Offences against the Person Act, 1861, s. 45

This is the most important of the bars. A detailed account of its operation has already appeared in this journal and need not be repeated here.[91] It will be recalled that the conclusion was reached that although the section bars action after prosecution, it does not bar action before prosecution or prosecution after action.

Game Act, 1831, s. 46

The Game Act creates, *inter alia*, a variety of particular offences of trespass. Section 46, after a proviso that nothing in the Act shall affect civil actions, continues: " save and except that where any proceedings shall have been instituted under the provisions of this

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[88] (1836) 5 A. & E. 619.

[89] Except for *Garth* v. *Earnshaw* (1839) 3 Y. & C.Ex. 584: n. 65, above.

[90] Offences against the Person Act, 1861, s. 45.

[90a] Not certainly: see [1958] Crim.L.R. 35–36.

[91] [1958] Crim.L.R. 33.

Act against any person for or in respect of any trespass, no action at law shall be maintainable for the same trespass by any person of whose instance or with whose concurrence or assent such proceedings shall have been instituted, but that such proceedings shall in such case be a bar to any such action. . . ." The section is an isolated one [92] and may have had its origin in the idea that landowners could recompense themselves sufficiently by claiming penalties under the Act. In *Robinson* v. *Vaughton* [93] it was decided that a conviction is not a condition precedent for the bar to operate. The mere institution of proceedings is enough.

Larceny Act, 1861, s. 109, and the Malicious Damage Act, 1861, s. 67

These two sections, which are almost identical and to the same effect, may possibly bar subsequent civil actions where there is a summary conviction under either Act. They provide that in four cases a person convicted under the Act " shall be released from all further or other proceedings for the same cause." The four cases are payment of any sum adjudged to be paid, with costs; remission thereof; serving imprisonment for non-payment thereof; and serving an original sentence of imprisonment.[94] Whether these sections create a bar to civil actions depends on the correct interpretation of the words quoted, particularly " proceedings." In the absence of any judicial pronouncement it is submitted that civil proceedings are not here referred to.[95] In the first place, the statute is a criminal one. It would be surprising if merely by using the vague word " proceedings " in a criminal statute the legislature in 1861 had brought a wide variety of summary offences within a rule as to civil actions which is distinctly exceptional in English law. Secondly, there is the express reference to civil proceedings in the bar set up by the Offences against the Person Act, 1861, s. 45. This statute was enacted at the same time as the Larceny Act and the Malicious Damage Act as part of the same scheme of legislation, and section 45 uses wording which is otherwise closely similar to sections 109 and 67. It is a reasonable inference that the omission of any express reference to civil proceedings in the two last sections is deliberate.

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[92] Two similar contemporary statutes, the Night Poaching Acts, 1828 and 1844, contain nothing comparable.

[93] (1838) 8 C. & P. 252.

[94] A fifth, discharge on payment of reparation to the prosecutor, was abolished by the Criminal Justice Act, 1948, s. 83 (2) (3), Sched. X, Part I.

[95] This is not to say that any sums recovered through the agency of the criminal court would not go in diminution of damages. No doubt they would.

It might be asked, What was the object of these two sections at all on this view of the law? The answer may be that they were inserted to emphasise that for the purpose of the rule against double jeopardy, summary convictions, provided they were followed by certain facts, had the same status as convictions on indictment.[96]

Protection of Animals Act, 1911, s. 4

Under this section, if injury is inflicted by an animal which has so acted because of cruel treatment by another person, compensation up to £10 can be recovered by application to the court on conviction of the offender. There then follows a proviso "that this section shall not . . . prevent the taking of any other legal proceedings in respect of any such damage or injury, so that a person be not twice proceeded against in respect of the same claim." The question is whether the concluding words of this proviso have the effect of barring an action for damages once compensation up to the statutory limit of £10 has been claimed before the criminal court. The case is different from the usual one in that the choice is not so much whether to forgo civil rights of action altogether, as whether to make one's claim before the criminal or the civil court. It is not clear why any sum awarded under the statute should not go merely in reduction of damages, but the wording of section 4 seems to preclude this possibility. However, it is hardly likely that a bar would arise if no compensation at all were claimed in the criminal proceedings, for in that case there would be no duplication of claims. The practical answer seems to be to ignore compensation under the Act if one's damage exceeds £10 plus the expense of an action for damages.[97]

Withdrawals of prosecutions

It remains to consider the effect of withdrawing a prosecution upon subsequent proceedings in the same court. As a practical problem this is confined to proceedings before magistrates instituted by private individuals.[98] The present law is that a summons may be withdrawn only by leave of the court, and that such a withdrawal does not bar another summons on the same facts at a later date, even in the same court.

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[96] The Larceny Act, 1861, s. 109, has been incorporated into the Seamen's Clothing Act, 1869 (s. 6), and into the Public Stores Act, 1875 (s. 12).

[97] *Cf.* the South African Prevention of Cruelty to Animals Act, 1914, s. 6, which is superior both in its drafting and in its more realistic £100 limit to compensation.

[98] The power to enter a *nolle prosequi* is not relevant here, and the bars to civil proceedings do not apply to prosecutions on indictment.

The rule that a summons can be withdrawn only by leave of the court was established in *Wiltshire Justices.*[99] A summons had been taken out against the applicant for common assault. A settlement was then reached between the parties and the applicant paid the prosecutor one guinea compensation. On the return day of the summons neither party appeared, and the magistrates were informed of the compromise. They declined to accept the situation, arrested the applicant, and convicted him on the original charge of assault. A rule nisi for certiorari to quash the conviction was discharged on the ground that once the information had been laid before them the magistrates were seised of the cause, and no merely private arrangement between the parties could deprive them of jurisdiction. The suggestion has been made[1] that where the court is satisfied that it has before it a genuine case of mistake, the prosecution having been started in ignorance of a bar to civil proceedings to which it might give rise, the best course would be to adjourn the hearing *sine die* to save the complainant's civil remedy. The propriety of prosecution could then be referred to the D.P.P. under the Prosecution of Offenders Act, 1879, which, by section 5, imposes upon a clerk to justices a duty to notify the D.P.P. of the discontinuance of any prosecution in his court.[2] A civil action would then remain unaffected, because the Director would proceed on indictment.[3]

It should be remembered that it is always open to the court to take a proposed settlement into account in reduction of punishment. *Roxburgh*[4] provides an illustration. The accused was charged with assault. At first he pleaded not guilty, and the jury[5] retired to consider their verdict. Unfortunately, even "after having been locked up some time," they were unable to agree. The suggestion was then made that the accused plead guilty and pay compensation to the prosecutor, in return for which the court would impose a merely nominal fine. This solution appears to have been adopted with decorous alacrity. £250 compensation was handed over and a fine of one shilling imposed. The comments of those members of the jury who favoured acquittal are not recorded.

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[99] (1863) 8 L.T. 242; *sub nom. Ex p. Bryant,* 27 J.P.J. 277.

[1] (1949) 13 *Journal of Criminal Law* 6.

[2] See also the Prosecution of Offences Regulations, 1946, reg. 9.

[3] Unless he let the proceedings drop this would be the only course open to him. The O.A.P.A., s. 42, gives power for an indictable assault to be tried summarily on complaint only by or on behalf of the party aggrieved. *Sed quaere*: could the Director of Public Prosecutions or any member of the public apply for mandamus to compel the magistrates to try the case, complaint having already been made?

[4] (1871) 12 Cox 8. See also *Beeley* v. *Wingfield* (1809) 11 East 46 and *Baker* v. *Townshend* (1817) 1 J.B.Moore 120.

[5] From which it is apparent that this was a trial on indictment. But the principle is of general application.

After some early doubts,[6] it was settled that the withdrawal of a summons by leave does not bar another summons on the same facts, even in the same court.[7] The doubts seem to have been based on an idea that the court, by once giving its consent to the discontinuance of proceedings, estopped itself from entertaining further summonses alleging the same facts.[8] In the later cases it was pointed out that not only was there no authority whatever for supposing the court's powers to be capable of limitation in this way, but also that such a rule would be inconsistent with the law of *autrefois acquit* and *convict* as giving an immunity from further criminal process without an adjudication of the issue.[9]

The question has usually arisen in connection with matrimonial proceedings. It is a common occurrence for a wife to take out a summons against her husband for maintenance, and then, because of a reconciliation, to withdraw it. If the reconciliation fails to endure in substance, the wife may yet find that the first summons has at least had the effect of making the husband keep his overt behaviour within the law. She is then obliged to rely on the same facts as before if she goes back to the court for another summons. The law is that she can do so,[10] but the same situation in principle can arise in other ways. For example, it may be discovered in the course of a summary trial that there is a technical defect in the procedure, or in the prosecution's case. *Davis* v. *Morton*[11] is an instance of a technical defect. A summons had been issued under the Betting Act, 1853, s. 1. During the hearing it was discovered that the defendant had not been informed of his right to trial by jury. The prosecution thereupon applied to withdraw the summons, and were permitted to do so. This decision was upheld by the Divisional Court, on a case stated after conviction on a subsequent summons. The court observed that where a summons was withdrawn on a technical ground to remedy a defect, the defendant had not been put in peril. There was therefore no reason why the withdrawal should operate as a discharge, as contended by the defendant. An example of a similar defect which affected the prosecution's case only, as opposed to the whole proceeding, is *Williams* v. *Letheren*.[12] The offence charged was under the Sale of Food and Drugs Act, 1890, s. 20 (6), and the defect was omission to serve a copy of the analyst's report on the defendant as required by section 19 (2). The same reasoning was applied as in *Davis* v. *Morton*.

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[6] *Pickavance* v. *Pickavance* [1901] P. 60; *Hopkins* v. *Hopkins* [1914] P. 282.

[7] In *Justices of Tyrone* [1912] 2 Ir.R. 44, Palles C.B. strongly dissented from *Pickavance* v. *Pickavance*. He was followed in England in *Davis* v. *Morton* [1913] 2 K.B. 479, which in turn was followed in *Williams* v. *Letheren* [1919] 2 K.B. 262, and *Owens* v. *Minoprio* [1942] 1 K.B. 193. The cases were reviewed and the law as stated reaffirmed in *Land* v. *Land* [1949] P. 405.

[8] [1901] P. 60, 64, *per* Sir F. Jeune P., stressing the element of consent.

[9] *Cf.* the comments on *Miles* (1890) 24 Q.B.D. 423, in [1958] Crim.L.R. 34. Evidently, for the purposes of *autrefois* the word "adjudication" has a wider meaning than for s. 45 of the O.A.P.A., 1861. The criticism of Sir F. Jeune's view by Palles C.B. in *Justices of Tyrone* is usually taken as the definitive statement of the correct rule. See note 7, above.

[10] *Owens* v. *Minoprio* [1942] 1 K.B. 193.

[11] [1913] 2 K.B. 479.

It is hardly necessary to point out that the case is quite different where a summons has been dismissed for want of evidence. Such a finding is merely another way of saying that the prosecution have not proved their case. Since the issue has gone to verdict, the defendant has been put in peril.[13]

Private Prosecution in Obstruction Cases

By Christopher Lovell

Recently the national press reported a " test case " in which a private prosecutor alleged that the defendant in each of three cases caused unnecessary obstruction with a car outside his house. The reports indicated the " test " to be whether or not a private individual was entitled to prosecute an offence under the Regulation. In fact in these cases (*Evans* v. *Walpole and others*: Bow Street Magistrates' Court, August 12, 1959) the court did not have to consider this aspect. There is no provision that offences under these Regulations shall be prosecuted only by the police, and they are accordingly in no way different from other offences generally in this respect. Unless in a given case there is a Supreme Court decision or a statutory provision to the contrary, any person is entitled to lay an information before a magistrates' court, and to prosecute an alleged offender. It results from the efficiency of our modern police forces in dealing with prosecutions that the public overlook their own powers, and regard prosecution (and arrest) as the right, or even the duty however trivial the complaint, of the police alone.

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[12] [1919] 2 K.B. 262.

[13] *Haynes* v. *Davis* [1915] 1 K.B. 332.

Was there, then, anything of particular interest in these cases?

In two cases the defendant was fined, in the third the summons was dismissed.

The cases were heard separately. None of the parties was represented. Briefly the informant's evidence was that on three days he watched from time to time, during eight to nine hours of daylight, the continuous line of parked and unattended vehicles along the kerb on his side of the road. On each occasion he noted the number of the particular car which had remained outside his house for the whole of the time. The parking resulted in his family and trade and other callers being unable to park vehicles outside even to carry purchases, etc., into the house. He decided to prosecute the drivers of the three cars he noted. Later he saw the first defendant parking one of the cars nearby, and complained to him of the earlier parking, and said he intended to prosecute. No denial of liability was forthcoming. (This defendant wrote to the court asking for the case to be heard in his absence.) In the other two cases after making inquiries the informant wrote to the defendants as the respective owners of the cars. (Notices to produce these letters were not served and therefore copies were not put in evidence.) The informant received no replies. Both of these defendants appeared in court. One pleaded guilty and was fined, the other pleaded not guilty. She appeared in a uniform similar to that which the informant had seen on the driver, but he was not in a position to identify the defendant as the driver, having seen her only from a distance. The summons was dismissed without the defendant giving evidence, there being no prosecution evidence that prima facie the defendant was the driver.

It is probable that the informant in writing to the two defendants hoped to obtain a statement as to the drivers of the cars in question. It is at this point that the powers of the police become greater than those of private prospective prosecutors. Section 113 (3), Road Traffic Act, 1930, provides that: " Where the driver of a vehicle is alleged to be guilty of an offence under this Act " (extended by section 32, Road Traffic Act, 1956, and section 12 (3), Road Transport Lighting Act, 1957) " (*a*) the owner of the vehicle shall give such information as he may be required *by or on behalf of a chief officer of police* to give as to the identity of the driver; . . . and (*b*) any other person shall if required as aforesaid, give any information which it is in his power to give and which may lead to the identification of the driver . . ." A person so required failing to give the information is guilty of an offence. A statement obtained *under this section* may be received in evidence under section 2, Magistrates' Courts Act, 1957.

The question then of interest to a private prosecutor is: "Having proved an unnecessary obstruction, can I prove the defendant caused it?" He may well be in difficulty if the defendant simply leaves him to prove his case. Unless the defendant was seen to be in charge of the vehicle, and gave his name and address at the time or is later recognised in court, mere ownership of the vehicle does not make him answerable. The person in charge at the time, not the owner as such, is the offender.

Before commencing proceedings the private prosecutor should be sure that he can discharge the onus on him of proving that a vehicle on a road caused unnecessary obstruction (for definition of which, see *Solomon* v. *Durbridge* (1956) 120 J.P. 231) and that this was caused or permitted by the defendant who was then in charge of the vehicle. It is the last point which may well cause a would-be private prosecutor to think again if the driver and the owner consistently refuse to give any assistance.

Practice and Procedure

Costs

The Lord Chief Justice, Lord Parker, sitting in the Court of Criminal Appeal on October 19, 1959 (with Ashworth and Edmund Davies JJ.) said that the attention of the court had been drawn to the difficult question as to the lines on which the discretion to award costs to an acquitted person should be exercised. That discretion, in the case of courts of assize and quarter sessions, was now given by section 1 (1) of the Costs in Criminal Cases Act, 1952, which was in terms completely unfettered. This court had said in a statement on March 24, 1952, that it was only in exceptional cases that such costs should be awarded, and such illustrations as were there given were cases where the prosecution could be said to be in some way at fault. There was, on the other hand, a suggestion that the mere fact of acquittal should carry with it the expectation that the discretion would be exercised in favour of the acquitted person. The correct view, however, was that there was no presumption one way or the other and the discretion conferred by the statute was absolutely unfettered. Each case ought to be considered on its own facts as a whole and costs awarded where the court thought it right. It was impossible to catalogue all the factors which ought to be weighed, but such factors as whether the prosecution had acted unreasonably in starting or continuing proceedings, and whether the accused by his own conduct had brought the proceedings or their continuation upon himself, were clearly relevant. However, this court entirely dissociated itself from the view that the judge was entitled to base his refusal to award costs on the ground that he thought that the verdict of the jury was perverse or unduly benevolent. The mere fact that the judge disagreed with the verdict of the jury was no more a ground for refusing to award costs to the acquitted person than the mere fact of his acquittal was a ground for awarding them. [H. P.]

Commentary. For an editorial comment suggesting the removal of the ban on awarding costs to acquitted prisoner except in exceptional cases, see [1959] Crim.L.R. 481. Whether the present direction will have the effect of inducing courts more readily to grant costs to acquitted prisoners remains to be seen.

Case and Comment *

CONSPIRACY

Indictment containing counts of false pretences, forgery and other frauds—reasonableness of verdict

R. v. Jackson and Others

Court of Criminal Appeal: Barry, Diplock and Salmon JJ.: October 19, 20, 21, 22, 26, 1959: *The Times*, October 20, 21, 22, 23, 27, 1959.[1]

J., M. and H. were convicted at the Central Criminal Court upon an indictment containing eleven counts of false pretences, forgery, conspiracy and other frauds. At the material times J. had been the chairman of a group of public companies, and all the charges arose from the takeovers of (*i.e.*, the purchase of the capital of) three other companies, namely, G. Ltd., B. Ltd. and S. Ltd.

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* Reported, unless otherwise stated, by Henry Palmer and David Calcutt, Barristers-at-Law. Commentaries by Professor J. C. Smith, M.A., LL.B., Barrister-at-Law.

[1] For the appellant Jackson: *F. H. Lawton, Q.C., L. Lewis* (instructed by Messrs. B. A. Woolf & Co.). For the appellant Morphew: *Neil Lawson, Q.C., Philip Goodenday* (instructed by Messrs. Edwin Coe & Calder Woods). For the appellant Hemmings: *Edward Gardner, Q.C., Christopher Beaumont* (instructed by Messrs. J. Tickle & Co.). For the Crown: *Mervyn Griffith-Jones, Edward Cussen* (instructed by the Director of Public Prosecutions).

J. had been the principal negotiator and, in all the cases, a substantial part of the consideration for the sale of the shares in the companies had been the allotment of shares in the purchasing company. The case for the prosecution had been that a larger number of shares had been allotted by the purchasing company than had been required and that J. had agreed to purchase these shares for cash, thereby secretly enriching himself. The conspiracy charged was a conspiracy to defraud by the fabrication of false documents and arose out of the purchase of B. Ltd. The auditors had inquired why such an excessive number of shares had been issued; and J. had told them that the true purchasers of the shares issued to B. Ltd. were "certain city interests." M. and H. had supported this statement by signing false letters. On appeal to the Court of Criminal Appeal on the main ground that the verdicts were unreasonable:

Held, that the evidence on the charges relating to B. Ltd. was so overwhelming that unless the jury attached credence to J.'s evidence (which clearly they did not), they could not but convict. In the case of the takeover of G. Ltd. the question was whether an alteration in a document relating thereto was made with the intention of deceiving shareholders; and it was impossible to say that the verdict was unjustified or unreasonable. However, on two counts of false pretences upon which J. had been convicted the evidence was in some respects unsatisfactory and, as this had not been brought to the attention of the jury, the convictions on those counts would be quashed. So far as the conspiracy was concerned, this court was of opinion that the evidence disclosed two conspiracies. This court had frequently deprecated the practice of adding a conspiracy charge where the case for the prosecution was in fact that some other crime than those charged had been committed by two persons. Counsel for the prosecution had not sought to uphold the conviction on this count and those convictions, therefore, would be quashed. [H. P.]

Commentary. The objection of the court to the joinder of charges for a completed crime and a conspiracy to commit it in the same indictment arises from advantages which such a procedure is thought to give to the prosecution in the admissibility of evidence. *Cf.*, however, Glanville Williams, *The Criminal Law*, § 162.

COURT OF CRIMINAL APPEAL

Jurisdiction—appeal against decision on preliminary issue—fitness to plead

See R. *v.* Podola, p. 847, *post.*

EVIDENCE

Indecent assault on child — corroboration — power of Court of Criminal Appeal to hear further evidence

R. v. Thomas

Court of Criminal Appeal: Lord Parker C.J., Ashworth and Hinchcliffe JJ.: October 5, 1959: 103 S.J. 813; [1959] 3 All E.R. 522n.[2]

T. was convicted at assizes of child stealing, abduction and indecent assault. All the charges arose out of incidents which occurred when T., who was driving his motor-car and had lost his way, invited a thirteen-year-old girl to accompany him for the purpose of directing him to a particular road. This was at about 9 p.m., and, according to the girl, between that time and five o'clock the following morning she was subjected to at least two serious indecent assaults. It was common ground that T.'s car had stopped more than once because the battery needed charging and that they obtained assistance in restarting it; and that, on the second occasion they strove for some hours to restart it by pushing it up a slope. The following morning the girl and T. had been found asleep in the car some eight miles away. The girl had her knickers on her lap. T. denied any indecency towards the girl or any attempt to remove her from her home. T. applied for leave to call further evidence before the Court of Criminal Appeal and, further, contended that the jury had been misdirected on the question of corroboration:

Held, allowing the appeal, that (1) part of the proposed further evidence related to events which had occurred after T.'s conviction and sentence and the Criminal Appeal Act, 1907, contained no express provision for the reception of such evidence. However, this court had heard the evidence *de bene esse* and were of the opinion that it was not of sufficient weight or reliability to have affected the jury's conclusion. This court had not ruled upon the question whether they had power or discretion to receive such evidence but were inclined to think, notwithstanding *R.* v. *Robinson* (1917) 12 Cr.App.R. 226, that in such a case the appellant's proper course was to lodge a petition with the Home Secretary so that he, if he thought fit, might refer the case to this court under section 19 (*a*) of the Act.

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[2] For the appellant: *N. R. Blaker* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Raymond Stock* (instructed by Messrs. Sharpe, Pritchard & Co., for Mr. C. P. Brutton, Dorchester).

(2) The case was clearly one in which the jury should have been warned of the danger of acting on the girl's evidence unless it were corroborated in some material particular. This warning had been given early in the summing-up and, later, two matters had been mentioned as constituting possible corroboration, namely a bottle of whisky and the girl's knickers. The bottle of whisky was not, in the view of this court, capable of constituting corroboration in respect of any of these three charges; and the girl's own explanation as to the way in which she came to take off her knickers negatived any indecency on the part of T. at that stage. Thus the jury were invited to consider as corroboration two matters which could not properly be so regarded. Further, the evidence as a whole was such as to arouse serious misgivings as to T.'s guilt. Accordingly, the appeal would be allowed and the conviction quashed. [H. P.]

Commentary. (i) By section 9 (*b*) of the Criminal Appeal Act, 1907, the court may, if they think fit, order any witness *who would have been a compellable witness at the trial,* to attend and be examined before the court. In *R.* v. *Robinson* it was unsuccessfully argued by the defence that the effect of these words was to exclude witnesses to facts occurring after the trial who, plainly, could not have been compellable witnesses at the trial. Evidence was admitted in that case that the accused had written a letter after his conviction in which he admitted his guilt and, on proof that the original had been destroyed, a copy of the letter was received in evidence. The court held that this course was justified by the concluding paragraph of section 9, authorising them to " exercise in relation to the proceedings of the court any other powers which may for the time being be exercised by the court of appeal on appeals in civil matters." Viscount Reading C.J. pointed out that it was clear that the Court of Appeal would have power to receive such evidence.

Since the Court of Criminal Appeal professes to be bound by its own decisions it is difficult to see why the matter was thought doubtful in the present case, for it would seem to have been concluded by *Robinson*. If evidence given after the trial is admissible for the prosecution, it must be equally admissible for the defence. The exception established by *R.* v. *Taylor* [1950] 2 K.B. 368, that it is the duty of the court to reconsider an earlier decision on the strength of which *an accused person has been sentenced and imprisoned,* would seem to have no application where the earlier decision is favourable to the prisoner in the later case.

(ii) Corroboration is independent evidence which implicates the prisoner by confirming, in some material particulars, the evidence of the witness who requires corroboration, that the crime was committed by the prisoner. It is difficult to see how the presence of a whisky bottle could have any possible bearing on the prisoner's guilt of the offence charged. The fact that the girl was found with her knickers in her lap is a different matter and, taken alone, might reasonably be thought to provide corroboration in a material particular on an indecent assault charge; but, since her own account of how they got there did not, apparently, involve any allegation of indecency, this was not corroboration in a *material* particular.

FOOD AND DRUGS

Extraneous matter—liability of retailer—failure to prove liability of manufacturer

Chingford Borough Council v. Gwalter and A. & B. C. Chewing Gum, Ltd.

Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Paull JJ.: *The Times*, October 14, 1959.[3]

G. was charged with having sold, to the prejudice of a young girl, a bubbly gum sweet containing an extraneous object, namely, a small piece of broken china, contrary to section 2 of the Food and Drugs Act, 1955.

When the information had been preferred against G., he had sought to take advantage of the provisions of section 113 of the Act, by laying an information against A. & B. C. Chewing Gum, Ltd., alleging that the contravention of section 2 was due to their default as manufacturers and suppliers of the gum. The gum of which complaint was made had been obtained from an automatic slot machine, of which G. was the proprietor.

The justices had held that G. was entitled to be dismissed from the case because the evidence showed that the broken china could not have been inserted into the gum by him after it had been delivered to him. The justices had also dismissed the information against A. & B. C. Chewing Gum, Ltd. because it had not been proved that the bubbly gum was manufactured or supplied by them. On appeal by the prosecutor,

Held, remitting the case to the justices, that the justices had misunderstood the effect of sections 2 and 113 of the Act: G. could only escape a conviction under section 2, if he could bring the person responsible before the court under section 113; it was never for the prosecutor to prove anything against A. & B. C. Chewing Gum, Ltd. [D. C.]

Commentary. In order to escape liability under section 113 the accused must prove not only (a) that he himself has used all due diligence to comply with the Act; but also (b) that the contravention was due to the act or default of the third party.

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[3] For the prosecutor: *J. T. Plume* (instructed by Town Clerk, Chingford). For the A. & B. C. Chewing Gum, Ltd.: *Cyril Salmon* (instructed by Messrs. Montague & Co.). G. did not appear and was not represented.

If he can prove only (b) and not (a), then both he and the third party are liable to conviction. If he can prove (a) and not (b) then, as the present case shows, the third party must be acquitted but the original accused remain liable.

FRAUD

Conspiracy and other frauds

See R. *v.* JACKSON AND OTHERS, p. 839, *ante*.

HABEAS CORPUS

Fugitive Offenders Act, 1881, s. 7—detention for one month or more—" sufficient cause "

Re Shuter

Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Hinchcliffe JJ.: [1959] 3 W.L.R. 652; 103 S.J. 855; [1959] 3 All E.R. 481.[4]

On June 17, S. appeared before the chief magistrate on a warrant issued by the Kenya Government in respect of some eleven alleged offences said to have been committed in Nairobi. The magistrate, having heard the evidence, committed S. to Brixton Prison to await his removal to Kenya. On June 30, S. applied for habeas corpus on the ground that the magistrate had committed S. without having heard any or sufficient evidence of the law of Kenya; and, on July 7, the Divisional Court remitted the case to the magistrate to hear evidence as to the law of Kenya. The magistrate heard evidence on July 15, and, on that date, committed S. to Brixton, to await his return, under a fresh warrant.

On July 15, S.'s solicitors asked a senior legal assistant in the Colonial Office to allow S. to return to Kenya at as late a date as possible. Later in the same day the solicitors asked the assistant to ignore the request. The assistant arranged that S. should return to Kenya with two officers of the Kenya police force, who were returning from leave, by a flight leaving England on August 16. The flight was subsequently cancelled.

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[4] For S.: *Neil Butter.* For the Government of Kenya: *John Mathew.* For the Governor of Brixton Prison: *J. H. Buzzard* and *M. D. L. Worsley.*

On August 17, S. was still in prison. He applied to the Divisional Court to be discharged from custody, pursuant to section 7 of the Fugitive Offenders Act, 1881. Section 7 provides: "If a fugitive who . . . has been committed to prison in any part of Her Majesty's dominions to await his return, is not conveyed out of that part within one month after such committal, a superior court, upon application by or on behalf of the fugitive, and upon proof that reasonable notice of the intention to make such application has been given . . . may, unless sufficient cause is shown to the contrary, order the fugitive to be discharged out of custody."

Held, dismissing the application, (1) that the true interpretation of section 7 was that there was no justification for holding a man beyond one month unless sufficient cause was shown; and

(2) That, on the facts of this case, "sufficient cause" had been shown. [D. C.]

Commentary. For earlier proceedings, see [1959] Crim.L.R. 656. The applicants' argument that "sufficient cause" must relate to something outside the control of the relevant authority was rejected as too narrow. August 16, a date known to be outside the time limit, was fixed to avoid curtailing the leave of an officer of the Kenya police. This, apparently, was a sufficient cause for so short a postponement.

HOMICIDE

Capital murder—diminished responsibility—direction by the judge on the meaning of "diminished responsibility"

R. v. Walden

Court of Criminal Appeal: Hilbery, Havers and Thesiger JJ.: July 30, 1959: [1959] 1 W.L.R. 1008; 103 S.J. 875; [1959] 3 All E.R. 203.[5]

W. was convicted at assizes of two capital murders by shooting. W., who was an assistant lecturer at a technical college had proposed marriage to a student and, when she had refused him and favoured a fellow student, W. shot them both. Evidence was called by the defence at the trial with a view to proving that W. was suffering from such abnormality of mind as substantially impaired his mental responsibility within the meaning of section 2 (1) of the Homicide Act, 1957. However, medical evidence called by the prosecution was to the effect that W. was not suffering from any abnormality of mind. The trial judge had handed a copy of section 2 (1) of the Act to the jury and had directed them that it was for them to say, upon the evidence whether W. had brought himself within the section or not. After referring to the definition of insanity in the *M'Naughten* case, the trial judge had continued: " There are some cases you may think where a man has nearly got to that condition but not quite; where he is wandering on the borderline between being sane and insane; where you can say to yourself, 'Well, really, it may be he is not insane, but he is on the borderline, poor fellow. He is not fully responsible for what he has done.' Now you may think, and it is entirely a matter for you, that that is what is meant by these words in the Act of Parliament, 'such abnormality as substantially impairs his mental responsibility.' In other words, he is not really responsible for what he is doing. His responsibility if not wholly gone has been impaired." On appeal to the Court of Criminal Appeal, W. contended, *inter alia*, that, on the authority of *R.* v. *Spriggs* [1958] 1 Q.B. 270, the judge misdirected the jury by attempting to define or re-define what Parliament had already defined in section 2 (1):

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[5] For the appellant: *H. C. Scott, J. F. S. Cobb* (instructed by Jackson & Jackson for Donald Dunn, Rotherham). For the Crown: *G. S. Waller, Q.C., J. B. Willis* (instructed by the Director of Public Prosecutions).

Held, dismissing the appeal, that *R.* v. *Spriggs* decided only that there was no duty upon the trial judge to define or re-define " abnormality of mind " or " mental responsibility." However, the judge was, in the opinion of this court, entitled to assist the jury upon the facts of the case by pointing out to them by way of illustration or explanation the sort of thing they could look for to see if the case came within the section. Thus, in the present case, the passage in the summing-up [set out above] was not a misdirection, and the judge rightly directed the jury that it was a question for them whether they found that W. had brought himself within the section or not. [H. P.]

Commentary. The description of diminished responsibility by the judge in the present case bears a close resemblance to that given by Lord Goddard in *Spriggs* (" a man may be not quite mad but a borderline case ") based upon Scottish decisions.

The proposition that the meaning of the words of an Act of Parliament is a question for the jury is a remarkable one, for it is well established that the construction of statutes is a matter of law for the court. No question being raised as to the meaning of the words, the direction perhaps conveyed no more to the jury than that it was for them to say whether the prisoner came within them—which was obviously correct. *Spriggs,* however, seemed to go farther and to say that it was for the jury to decide between conflicting submissions as to the meaning of the words. *Cf.* the Commentary at [1958] Crim. C. & C. 70; [1958] Crim.L.R. 191.

Capital murder—fitness to plead—hysterical amnesia

R. v. Podola

Court of Criminal Appeal: Lord Parker C.J., Hilbery, Donovan, Ashworth and Paull JJ.: October 14, 15, 20, 1959: [1959] 3 W.L.R. 718; 103 S.J. 856; [1959] 3 All E.R. 418.[6]

P. was convicted at the Central Criminal Court of capital murder. At the trial the preliminary issue was raised as to P.'s fitness to plead, and on this issue P. relied solely on an hysterical amnesia preventing him from remembering events during the whole of the material period. The trial of the preliminary issue was dealt with in two stages: in the first the jury were required to answer the specific question whether P. was then and at the material times suffering from a genuine loss of memory, and the jury found that he was not. In the second stage the jury were required to find whether P. was insane so that he could not be tried, and the jury found, by direction, that he was fit to stand his trial. He was then tried and convicted of capital murder.

The case was referred to the Court of Criminal Appeal by the Home Secretary under section 19 (*a*) of the Criminal Appeal Act, 1907, on the question whether the onus of proof of unfitness to plead was on the defence or the prosecution. The trial judge had ruled that it was for the defence to establish that P. was unfit to plead and that it was sufficient for the defence to discharge the burden if they could show, on the balance of probabilities, that he was unfit to stand his trial.

Section 2 of the Criminal Lunatics Act, 1800, provides that: "If any person indicted for any offence shall be insane, and shall upon arraignment be found so to be by a jury lawfully impanelled for that purpose, so that such person cannot be tried upon such indictment . . ." the court may record the finding and order the person to be kept in custody during Her Majesty's pleasure.

The further question was raised whether the Court of Criminal Appeal had jurisdiction to entertain the reference.

Held, (1) that if a convicted person appealed against his conviction on the ground that the hearing of the preliminary issue was open to objection for error in law, so that he should never have been tried upon the substantive charge at all, this court was of opinion that they had jurisdiction to entertain the appeal. If *R.* v.

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[6] For the appellant: *F. H. Lawton, Q.C., R. J. S. Harvey* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *Maxwell Turner, J. H. Buzzard* (instructed by the Director of Public Prosecutions). *Amici curiae*: *Sir Reginald Manningham-Buller, Q.C., A.-G., J. R. Cumming-Bruce* (instructed by the Treasury Solicitor).

Jefferson (1908) 24 T.L.R. 877, decided otherwise it was wrongly decided. As this court had jurisdiction to hear and determine a reference by the Home Secretary in cases where the convicted person would have had a right of appeal under the Act, it followed that they had jurisdiction to hear and determine this reference.

(2) In all cases where the preliminary issue as to the accused's insanity was raised the jury should be directed to find whether upon the whole of the evidence they were satisfied that he was insane so that he could not be tried upon the indictment. Where the issue was raised by the defence it was for the defence to satisfy the jury of the accused's insanity, but the onus of proof, as in other cases where the onus of proof was on the defence, would be discharged if the jury were satisfied on the balance of probabilities. These principles were in accordance with *R.* v. *Dyson* (1831) 7 C. & P. 305; *R.* v. *Pritchard* (1836) 7 C. & P. 303; *R.* v. *Turton* (1845) 6 Cox 385; *Rivett's Case* (1950) 34 Cr.App.R. 87, and *Russell's Case*, 1946 S.C.(J.) 37. The decisions in *Ley's Case*, 1 Lewin 239; *R.* v. *Davies* (1835) 3 C. & K. 328, and *R.* v. *Sharpe* [1958] 1 All E.R. 62, which conflicted with the present decision, were wrongly decided. The direction given by the trial judge in the present case on the onus of proof was, therefore, right.

(3) In many cases since 1800 section 2 of the Criminal Lunatics Act had been construed as including persons who were not insane within the M'Naughten rules but who by reason of some physical or mental condition could not follow the proceedings at the trial and so could not make a proper defence in those proceedings. It was important to stress that P., in the present case, had relied solely upon an hysterical amnesia and consequent loss of memory. There had been no suggestion that his mind in other respects was not completely normal. The tests to be applied where fitness to plead was in issue had been laid down in *R.* v. *Pritchard* (1836) 7 C. & P. 303, where it was said that the jury should be directed to find whether the prisoner was of sufficient intellect to comprehend the course of proceedings on the trial so as to make a proper defence." That direction was not intended to, and did not, cover a case where the prisoner could plead to the indictment and had the physical and mental capacity to know that he had the right of challenge and to understand the case as it proceeded. This court agreed with the opinions stated and the conclusions arrived at in *Russell's* case, *supra*, in which the question of unfitness to plead by reason of hysterical amnesia had been dealt with in Scotland. The word " insane " in the Act of 1800 ought not, in the opinion of this court, to be extended so as to include persons who were mentally normal at the time of trial and were capable of instructing their solicitors

as to what submission to put forward with regard to the commission of the crime. [H. P.]

Commentary. It would seem that counsel for the appellant had to establish three points in order to succeed: (i) that the court had jurisdiction to hear the appeal; (ii) that the judge's direction that the onus of proof of unfitness to plead was on the defendant was wrong in law; and (iii) that a state of amnesia could form grounds for a verdict of unfitness to plead. He succeeded on the first point but failed on both the second and third.

(i) In *R.* v. *Jefferson* Darling J.'s ruling that there was no right of appeal against a finding of fitness to plead was based on the fact that the Criminal Appeal Act only gives leave to appeal against "a conviction." "How can you say," he asked counsel for the appellant, "that a finding of fitness to plead is a conviction?" Counsel thereupon withdrew his appeal on that point. Darling J.'s reasoning seems to have been faulty. The prisoner *does* appeal against his conviction, alleging that, in law, he ought never to have been tried at all and therefore that the whole trial, including the conviction, is void. The logical consequence is that if an appeal against a finding of fitness to plead succeeds, the court will have power to order a new trial. *Cf. Crane* v. *D. P. P.* [1921] 2 A.C. 299, referred to by the court in the present case.

(ii) The issue of fitness to plead may be raised by the defence (as in the present case), by the prosecution or by the court: Report of the Royal Commission on Capital Punishment, para. 220. The principle, "He who asserts must prove," appears to underlie the court's decision. If the prosecution assert that the prisoner is unfit to plead then the onus is on them. In such a case, would they have to satisfy the strict criminal standard of proof beyond reasonable doubt or would it be enough for them (as it is for the prisoner where he asserts his unfitness) to prove their case on a balance of probabilities? At the trial, Edmund Davies J. thought that the strict criminal standard was appropriate and it is respectfully submitted that this is correct. Where does the onus of proof lie if the issue is raised by the judge? Presumably on the prosecution. According to Mr. Lawton at the trial, it has been the normal practice in recent years for the prosecution to call the evidence.

Since the Homicide Act introduced the defence of diminished responsibility an analogous position may arise at the trial. If the prisoner sets up diminished responsibility, the prosecution may allege that he is insane whereupon the onus of so proving lies upon them: *R.* v. *Bastian*, 42 Cr.App.R. 75; [1958] Crim.C. & C. 67; but if the prisoner sets up insanity and the prosecution allege that his case is one only of diminished responsibility, then the onus of proof of insanity is, as is usual, on the prisoner.

The question as to the onus of fitness to plead raises important issues of policy. The matter may be so difficult either to prove or to disprove that the dispositions of the onus of proof may well be decisive. It probably was so in the present case. (After a retirement of three hours and twenty minutes the jury returned for further direction on the onus of proof. Five minutes after the judge had reiterated that the onus of proof was on the accused, they had agreed that he was not suffering from a genuine loss of memory.) In favour of the present decision it may be argued that if the prisoner, merely by raising the issue, could throw an onus of proof on to the prosecution an easy way of escaping trial might be provided. This danger would not be very great, however, except in capital cases, for the prospect of detention during Her Majesty's pleasure—which could be life-long—would usually be at least as repellent as that of conviction. Against the present decision it may be pointed out that a man may be convicted and hanged although a jury was not satisfied that he was capable of making out a proper defence at his trial. If a jury, under the present ruling, were to conclude that it was just as likely as not that the prisoner was unfit to plead—that the evidence was exactly evenly balanced—it would be their duty to find him fit. Yet if a man is unfit to be tried, within the meaning of the law, he certainly does not get a fair trial.

(iii) Important considerations of policy were also undoubtedly raised by the question whether amnesia constituted unfitness to plead. Thus it was suggested that, if it did, a man who was so drunk that he could not remember what he did could not be tried. Counsel met this by distinguishing between that which is brought about by a man's own act and that which is brought about by the visitation of God; but the case of a motorist who suffers concussion in an accident alleged to constitute dangerous driving is less easily disposed of, without pre-judging the issue. It would obviously be unsatisfactory that such persons could not be tried. On the other hand, it is not entirely satisfactory that a man should be tried for events which he cannot remember. It is difficult to see that he is then "able to instruct his legal advisers so that a proper defence can be established." Suppose a case where the actual facts justified a defence of, *e.g.*, accident or even alibi. If the accused were unable to remember the facts, the defence, in the absence of witnesses, could not be raised.

The matters involved in this case are obviously of exceptional public importance, as well as of exceptional difficulty, and it is submitted, with great respect, that it is unfortunate that the Attorney-General was unable to find that it was in the public interest that a further appeal be made to the House of Lords.

Manslaughter—defective summing-up—application of proviso to section 5 (1) *of the Courts-Martial* (*Appeals*) *Act*, 1951

R. v. Cashmore

Courts-Martial Appeal Court: Hilbery, Havers and Thesiger JJ.: July 28, 1959.[7]

C. was convicted by general court-martial of murder. The confirming officer substituted a finding of manslaughter. C. had taken a rifle from the armoury and threatened a number of men, including Lieutenant R. C. fired some shots (one of which fatally wounded Lieutenant R.) until an officer succeeded in arresting him. On appeal to the Courts-Martial Appeal Court the main issue was whether the proviso to section 5 (1) of the Courts-Martial (Appeals) Act, 1951 (whereby the court is empowered, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, to dismiss an appeal if they consider that no substantial miscarriage of justice has actually occurred) ought to be applied.

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[7] For the appellant: *Stanley Rees, Q.C., R. J. A. Batt* (instructed by the Registrar, Courts-Martial Appeal Court). For the Crown: *E. Garth Moore* (instructed by the Directorate of Army Legal Services).

Held, that the summing-up was in many respects defective. It was unnecessary to deal with specific criticisms as the question for this court was: " Was this so clear a case of manslaughter that no court-martial, properly directed, could have reached any other conclusion." If in the course of conduct which was unlawful and dangerous the accused did an act which caused the death of another person, that was, as had been laid down in *R.* v. *Henry Larkin*, 29 Cr.App.R. 18 at p. 23, the offence of manslaughter. In the present case C. said that he fired the rifle accidentally but, if that was so, he was nonetheless guilty of manslaughter. In the opinion of this court, no court-martial properly directed could have reached any conclusion in this case except that it was manslaughter and, accordingly, the proviso to section 5 (1) would be applied and the appeal dismissed. [H. P.]

Commentary. The case affirms the objective test of manslaughter laid down in *Larkin*. In that case the court described a " dangerous " act as " an act which is likely to injure another person." It appears that if an act which is " dangerous " and " unlawful " causes death, that is manslaughter and it is entirely immaterial whether the accused person foresaw the possibility of any harm whatever to anyone. In other words, no *mens rea* is required, and negligence alone will suffice.

In *Larkin* the court distinguished between unlawful dangerous acts and lawful dangerous acts. An act of the latter kind which causes death will not amount to manslaughter, it was said, " unless the negligence is of a very high degree. The expression most commonly used is 'unless it shows the accused person to have been reckless as to the consequence of the act.' " It is not entirely clear whether this lays down another objective test, simply requiring a higher degree of negligence, or whether recklessness in the sense of foresight of consequences is required.

The doctrine of *Larkin's* case is criticised by Mr. J. W. C. Turner in " The Modern Approach to Criminal Law," 229 and 240 and by Dr. Glanville Williams, " Constructive Manslaughter " [1957] Crim.L.R. 293, 299. It seems clear that the test of " unlawful and dangerous " act cannot be applicable in all circumstances, for in *Andrews* v. *D. P. P.* [1937] A.C. 576, where the conviction for manslaughter was quashed, the act which caused death was both unlawful (the misdemeanour of dangerous driving) and dangerous. It seems likely—as Dr. Williams suggests—" that the rule in *Larkin* must be limited to cases where the defendant has been guilty of an assault or battery, or (perhaps) other crimes of intention or recklessness against the person (such as the malicious administration of a noxious drug); and even then it applies only when the defendant's act can be said to be dangerous."

MAGISTRATES' COURTS

Plea of guilty by post—two charges, no reference made to one of them

R. v. Burnham, Bucks, Justices Ex p. Ansorage

Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Hinchcliffe JJ.: [1959 1 W.L.R. 1041 ; [1959] 3 All E.R. 505.[8]

A. was charged with causing an unnecessary obstruction of the road, contrary to regulation 89 of the Motor-Vehicles (Construction and Use) Regulations, 1955. She was also charged with the commission of an offence under the London Traffic (Restriction of Waiting) (Station Parade) Gerrards Cross Regulations, 1952. The informations were served on A. and were accompanied by two forms, pursuant to section 1 (1) of the Magistrates' Courts Act, 1957. The first form was headed " Statement of Facts." This document set out the facts of the two alleged offences. The other form was headed " Notice of Plea of Guilty." The applicant filled up this form, but made no reference to the charge of causing an unnecessary obstruction. When the matter came before the court, A. did not appear, and the court treated the plea as a plea of guilty to both charges. On application for certiorari.

Held, that the conviction on the first charge must be quashed; but that the conviction on the second charge would stand. [D. C.]

Commentary. The Magistrates' Courts Act, 1957, made it possible, for the first time, for persons charged with summary offences to plead guilty without appearing before the court, and the provisions of the Act must be complied with strictly.

It was contended that the second conviction should also be quashed as the second information put the defendant in peril twice for the same offence. The court held, however, that they could only quash either for want of jurisdiction or error of law on the face of the record. The magistrates had jurisdiction, and there was no error of law on the face of the record since, for all the court could tell there might have been two offences at different times on the same day.

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[8] For A.: *Henry Summerfield* (instructed by Amery-Parker & Co.).

The court held, furthermore, that even if the legal requirements for the grant of certiorari had been fulfilled, this was not a case in which the court should exercise its discretion to grant the order. "It would be very novel to grant certiorari in a case where the applicant has pleaded guilty."

NIGHT POACHING

Sentence

See R. *v*. WRAY, p. 858, *post*.

ROAD TRAFFIC

By-law—unlawfully loitering in docks—difference between "loitering on" and "being on" property

Healy v. Parry

Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Hinchcliffe JJ.: *The Times*, October 9, 1959.[9]

Two taxi-drivers were charged with unlawfully loitering about docks owned by the British Transport Commission, without having proper business thereat, contrary to by-law 34 of the Great Western Railway, Swansea Harbour By-Laws and Regulations (General).

The British Transport Commission had, until 1958, licensed the taxi-drivers to ply their taxis for hire inside the dock. In February, 1958, however, it was decided to grant no more licences, and the drivers were informed that they would, in future, be permitted to drive into the dock only for the purposes of conveying passengers to their destinations or of picking up passengers when a specific order had been received by them to do so.

Subsequently, the taxi-drivers brought their taxis into the dock, without conveying passengers and without having a specific order to pick up any. One vehicle was said to have been standing, the other to have been stationary; but the appellants, so far from having driven slowly about the dock, had driven the taxis out of the dock. On appeal against conviction,

Held, allowing the appeal, that there was a distinction to be drawn between "loitering" and "being thereon"; and that although the taxi-drivers might well have been convicted of "being on" the Commission's property, they could not, on the facts, be convicted of "loitering."

Ledwith v. *Roberts* [1937] 1 K.B. 232 considered. [D. C.]

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[9] For the taxi-drivers: *James W. Borders.* For the prosecutor: *Paul Wrightson.*

Dangerous driving—excessive speed—question for justices

Johnstone v. Hawkins

Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Hinchcliffe JJ.: *The Times*, October 6, 1959.[10]

H. was charged with dangerous driving, and with driving without due care and attention. The justices dismissed the informations. On appeal by the prosecutor, the justices found that H. had been driving a motor-cycle along a main road, and that he had crossed a road junction at between 85 and 90 m.p.h. The road leading off the main road was controlled at the junction by a "Slow—Major Road Ahead" sign. When some twenty yards short of the junction H. would have had a clear view of the full width of the main and minor roads, and this view would have remained so until he had passed the full width of the road junction. Whilst travelling that twenty yards and the full width of the road junction (a total of some 220 feet) H. would have been able to have seen approximately a quarter of a mile along the main road and about 350 yards along the minor road.

Held, dismissing the appeal, that the question of dangerous driving and of driving without due care and attention was essentially one for the justices. [D. C.]

Commentary. The court will not interfere with an acquittal by the magistrates on an issue of fact unless their finding is perverse—*i.e.*, one at which no reasonable bench could arrive. *Gibbons* v. *Kahl* [1956] 1 Q.B. 59. *Cf.* [1959] Crim.L.R. 459 for earlier proceedings.

Notice of intended prosecution—registered letter accepted by person other than defendant

Layton v. Shires

Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Hinchcliffe JJ.: 103 S.J. 856.[11]

S. was charged with driving without due care and attention, alternatively without reasonable consideration for other persons using the road, contrary to section 12 of the Road Traffic Act, 1930. The prosecutor sent a notice of intended prosecution by registered post to S. at his home address within the statutory period of fourteen days. When the letter came to be delivered, S. was abroad. The letter was received and signed for by a person in S.'s employ. S. first became aware of the notice several weeks later. The justices were of the opinion that the requirements of section 21 of the Road Traffic Act, 1930, had not been sufficiently complied with. On appeal by the prosecutor,

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[10] For the prosecutor: *Andrew Edwards* (Messrs. Field, Roscoe & Co. for Guy H. Davis, Gloucester). H. did not appear and was not represented.

[11] For the prosecutor: *A. C. L. Lewisohn* (instructed by Messrs. Wontner & Sons). For S.: *Raymond Stock* (instructed by Mr. J. B. Izod).

Held, that if a notice under section 21 were sent by registered post to a defendant, and delivery of it were accepted either by him or by someone authorised to accept delivery of letters on his behalf, the requirements of the section were complied with, even if the notice did not reach his hands within the statutory period. [D. C.]

Commentary. By section 21 of the Road Traffic Act, 1930, a person may not be convicted of several offences under that Act, including careless driving, unless he was warned at the time of the offence that he might be prosecuted, or either a summons or a notice of intended prosecution was served on or sent by registered post to him within fourteen days. In *Sandland* v. *Neale* [1956] 1 Q.B. 241 the defendant was seriously injured in a car accident and the police, thinking it improper and unwise to serve a notice on him personally, sent the notice addressed to the defendant at his home where it was received by his wife. The Divisional Court (Barry J. dissenting) held that this was a sufficient notice on the ground that it was the sending and not the receipt which was decisive. On that point the case was overruled by *Beer* v. *Davies* [1958] 2 Q.B. 187; [1958] Crim.C. & C. 99, holding that proof of actual receipt was necessary.

The present case seems to suggest that *Sandland* v. *Neale* may in fact have been a correct decision on the different ground that the notice was delivered to someone "authorised to accept delivery of letters" on the defendant's behalf. It is true that, in his dissenting judgment, Barry J. said: "A wife, as I see it, is not an agent authorised to receive communications of this kind on behalf of her husband and, in any event, the Act requires the notice to be sent to the accused and not to his agent"; but the present case seems to establish the contrary.

Obstruction—parking on a grass verge

Worth v. Brooks

Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Hinchcliffe JJ.: *The Times*, October 12, 1959.[12]

W., whilst attending a meeting, parked his car for five hours on a grass verge by the side of the carriageway. He was charged with causing an unnecessary obstruction of the road, contrary to regulation 89 of the Motor Vehicles (Construction and Use) Regulations, 1955. The regulation provides that "No person in charge of a motor-vehicle or trailer shall cause or permit the motor-vehicle or trailer to stand on a road so as to cause any unnecessary obstruction thereof." The justices convicted W. who appealed to the Divisional Court.

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[12] For W.: *A. J. Irvine, Q.C.*, and *R. C. C. J. Binney* (instructed by Messrs. Amery-Parkes & Co. For the prosecutor: *John Wood* (instructed by Messrs. Trower, Still & Keeling for Messrs. Thomas Mallam, Grimsdale & Co., Oxford).

Held, dismissing the appeal (1) that it was clear that the whole of the highway constituted a road within the meaning of regulation 89; and that a motor-vehicle caused an obstruction by standing on the grass verge no less than if it had been standing on the carriageway itself;

(2) that there was ample evidence on which the justices could hold, as they had done, that the parking of the car was an unnecessary obstruction. [D. C.]

Commentary. " In the case of an ordinary highway, although it may be of a varying and unequal width running between fences one on each side, the right of passage or way (prima facie and unless there be evidence to the contrary) extends to the whole space between the fences; and the public are entitled to the use of the entire of it as a highway, and are not confined to the part which may be metalled or kept in order for the more convenient use of carriages and foot passengers ": *R.* v. *United Kingdom Telegraph Co.* (1862) 31 L.J.M.C. 166, *per* Martin B.

The court emphasised that the question is whether the obstruction is " unnecessary " not whether it is " unreasonable." If parking is unreasonable then it is certainly unnecessary: *Solomon* v. *Durbridge* (1956) 120 J.P. 231; but the Lord Chief Justice said he wished to keep open the question whether reasonable parking could be held to be an unnecessary obstruction. Yet (with respect) the parking in this case was surely not unreasonable. *Cf.* [1957] Crim.L.R. 178 and 500.

It may be that there were special considerations, not appearing in the report, which justified the bringing of a prosecution in this case but, it is submitted, a strict enforcement of the law as it appears therein would be undesirable. The following remarks of a correspondent in *The Times* concerning the present case are pertinent:

" Could you draw the attention of chief constables to the clear example this case provides of behaviour that effectively alienates public opinion? Your report makes it clear that no impediment could have been caused to traffic on the road and it is equally clear that, whatever the legal arguments, this prosecution should never have been brought. In the lay view, no useful purpose is served by pettifogging action of this kind, and until senior ranks prevent it they need blame no one but themselves for the public contempt of which they complain so loudly."

Pedestrian crossing — failure to accord precedence to a foot passenger

Lockie v. Lawton

Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Paull JJ.: 103 S.J. 874.[13]

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[13] For the prosecutor: *P. D. Cotes-Preedy* (instructed by Sharpe, Pritchard & Co. for Town Clerk, Nottingham). For the driver: *Henry Newman* (instructed by Geoffrey B. Gush & Co. for Messrs. R. A. Young & Pearce, Nottingham).

A trolley-bus driver was charged with having failed to accord precedence to a foot passenger who was within the limits of an uncontrolled pedestrian crossing, contrary to regulation 4 of the Pedestrian Crossings Regulations, 1954. As the driver had approached the crossing, his view of the crossing was partially blocked, and his view of a pedestrian who was then on the crossing completely blocked, by another vehicle. When the driver saw the pedestrian, he applied his brakes violently, but a collision occurred. The justices held that the driver had no case to answer. On appeal by the prosecutor,

Held, allowing the appeal, that it was the duty of a motorist approaching a pedestrian crossing to drive in such a way that he could stop if, in fact, there was a pedestrian on the crossing, although the pedestrian's presence was hidden from him.

Gibbons v. *Kahl* [1956] 1 Q.B. 59 applied. [D. C.]

Commentary. Regulation 4 provides that " every foot-passenger on the carriageway within the limits of an uncontrolled crossing shall have precedence within those limits over any vehicle and the driver of the vehicle shall accord such precedence to the foot-passenger, if the foot-passenger is on the carriageway within those limits before the vehicle or any part thereof has come on to the carriageway within those limits."

In *Leicester* v. *Pearson* [1952] 2 Q.B. 668 it was held by the Divisional Court that this must be read subject to the qualification that the driver is to use reasonable endeavours, in the particular circumstances, to accord the necessary precedence. If, through his failure to do so, an accident occurs on a crossing, a finding that there has been no negligence on the part of the driver will afford a complete defence. In that case a driver who, while exercising all due care and keeping a proper look-out, skidded into a woman on a crossing, was held not guilty.

In *Gibbons* v. *Kahl* [1955] 1 Q.B. 59 the court held (a), reversing the justices, that the accused was guilty under regulation 4 when he ran into a child on a crossing through not seeing her until it was too late, and (b) that the justices' finding that the same incident did not amount to careless driving under section 12 (1) of the Road Traffic Act, 1930, was not perverse and could stand. This is not easily reconciled with *Leicester* v. *Pearson*, for the court seems to be saying, (a), he is guilty under regulation 4 although, (b), he is not negligent. Doubt may also be thought to be cast on *Leicester* v. *Pearson* by Lord Goddard C.J.'s remarks that that " was a very special case " and that " there were very peculiar facts in that case." Such words are commonly used when the court wishes to indicate that an earlier case should not be followed without formally overruling it.

The impression of inconsistency between the two cases is heightened by Lord Goddard's observation that " In the present case, as he approached the crossing the respondent was guilty of *no negligence at all*, but when he got to the crossing I think he became under a duty to stop because the bus had stopped . . ." This seems to impose the very absolute prohibition which the court in *Leicester* v. *Pearson* was anxious to avoid; but Lord Goddard went on: ". . . and therefore he *should have realised* that pedestrians were on the crossing." Failure to realise, when he should have realised, is surely negligence and this remark seems inconsistent with the first part of the sentence. Furthermore, both Ormerod and Barry JJ. used words indicating that the defendant was at fault in the manner in which he approached the crossing (he "ought to have anticipated that pedestrians might be emerging").

It is submitted, therefore, that *Leicester* v. *Pearson* is still good law and that negligence must be proved for a conviction under the regulation. The duty of care imposed is a high one and a breach of it will not necessarily amount to an offence under section 12 (1) of the Road Traffic Act, 1930. A motorist who approaches a crossing where, as in the present case, he might reasonably anticipate that a concealed pedestrian might emerge, is negligent if he is not in a position to stop short of the crossing. The standard, though higher than that of section 12 (1), no doubt resembles it in being "an objective standard, impersonal and universal, fixed in relation to other users of the highway. It is in no way related to the degree of proficiency or degree of experience to be attained by the individual driver": *McCrone* v. *Riding* [1938] 1 All E.R. 157.

SENTENCE

Night poaching—three or more persons acting together—possession of shot-gun

R. v. Wray

Court of Criminal Appeal: Lord Parker C.J., Slade and Winn JJ.: June 15, 1959: *The Times*, June 16, 1959.[14]

W. was convicted at assizes of night poaching under section 9 of the Night Poaching Act, 1828, and sentenced to twelve months' imprisonment. Under that section three or more persons acting together and being armed commit an offence which is triable only at assizes and is subject to a maximum penalty of fourteen years' imprisonment. W. and two others were armed with a shot-gun but with no other weapons and, being surprised by gamekeepers, used no violence. One of the men had a sack containing fifteen freshly killed pheasants. W. was a man of thirty-one years of age and of previous good character. On appeal to the Court of Criminal Appeal against his sentence:

Held, that the crime of poaching by night was probably very prevalent today but did not often come before this court, no doubt because where a single person was involved, it could be dealt with by the magistrates. Although this was an offence against an Act of 1828 (when sentences in protection of property were more severe than today), the offence was a serious one; but having regard to the fact that none of the men was armed except with the gun which was being used for the purpose of shooting the pheasants and to W.'s previous good character, the sentence would be reduced to one of six months' imprisonment. [H. P.]

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[14] For the appellant: *M. Pearson* (instructed by Pickering, Cooper, Harland & Whitcombe, York).

Commentary. The tendency for offences against property to carry particularly heavy penalties is pointed out in a report by "Justice," "Legal Penalties; the Need for Revaluation": [1959] Crim.L.R. 393, 399.

Preventive detention — notice of intention to prove previous convictions

R. v. Long

Court of Criminal Appeal: Lord Parker C.J., Ashworth and Edmund Davies JJ.: October 19, 1959: *The Times*, October 20, 1959.[15]

L. had been convicted at quarter sessions of storebreaking and placed on probation. During the currency of the probation period he committed a further offence for which he was dealt with by another court. He was then brought back to the quarter sessions to be dealt with for the breach of probation. Notice in accordance with section 23 of the Criminal Justice Act, 1948, of intention to prove previous convictions was served upon L. on July 18 and he was sentenced on July 21 to eight years' preventive detention. On appeal to the Court of Criminal Appeal against that sentence L. contended that the provisions of section 23 of the Criminal Justice Act, 1948, as to the notice had not been complied with.

Section 23 of the Criminal Justice Act, 1948, provides that, for the purposes of determining whether an offender is liable to be sentenced to corrective training or preventive detention, no account shall be taken of any previous conviction or sentence unless notice has been given to the offender and to the proper officer of the court at least three days before the trial that it is intended to prove the conviction or sentence.

Held, that the ordinary rule for the running of time was that the day of service was not included but the day of the event to which the notice related was. However, in *R.* v. *Turner* [1910] 1 K.B. 346 the requirement of another statute that seven days' notice of intention to prove convictions should be given to the defendant had been interpreted as a requirement that there should be seven clear days' notice. In the opinion of this court section 23 of the Act of 1948 must be construed in the same way and, as in the present case three clear days' notice had not been given, the sentence of preventive detention could not stand. A sentence of five years' imprisonment would be substituted for the sentence of eight years' preventive detention. [H. P.]

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[15] For the appellant: *Patricia Coles* (instructed by the Registrar, Court of Criminal Appeal). The Crown was not represented.

Commentary. *R.* v. *Turner* was concerned with section 10 (4) (*b*) of the Prevention of Crime Act, 1908, where the relevant words were "not less than seven days'" notice. There seems to be no significant difference between "not less than" and "at least." Moreover, where a statute is equally capable of bearing either of two reasonable meanings, the meaning more favourable to the prisoner should be adopted.

Sentence quashed and shorter sentence substituted — loss of remission before substitution

Hancock v. Prison Commissioners

Vacation Court: Winn J.: September 18, 1959: [1959] 3 W.L.R. 583; 103 S.J. 813; [1959] 3 All E.R. 513.[16]

H. had been sentenced in 1955 to ten years' imprisonment. He had appealed to the Court of Criminal Appeal against that sentence in 1957 when an order was made that "the court doth . . . quash the sentence . . . and doth pass a sentence of seven years' imprisonment . . . in substitution for the sentence of ten years." H. had suffered loss of remission prior to his appeal but contended that that loss was incurred in respect of the original sentence, and the original sentence having been quashed, he was, therefore, entitled to release from prison on the expiration of two-thirds of the seven-year sentence. The Prison Commissioners contended that the loss of remission continued to apply to the substituted sentence. H. claimed declarations that (1) he was entitled to release on the expiration of two-thirds of the substituted sentence and (2) he had not lost or forfeited any remission of that sentence.

Section 25 (1) of the Prison Act, 1952, provides that rules under the Act may make provision for the grant of remission to a prisoner "on the ground of his industry and good conduct." The rules made thereunder provide that "arrangements shall be made by which a prisoner serving a sentence of imprisonment . . . may by good conduct and industry become eligible for discharge when a portion of his sentence not exceeding one-third of the whole sentence had yet to run . . ."

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[16] For the plaintiff: *Neil McKinnon, Q.C.*, and *George Shindler* (instructed by S. Sydney Silverman). For the defendants: *Sebag Shaw* (instructed by the Treasury Solicitor).

Held, that although the Court of Criminal Appeal had quashed the original sentence, the word " quash " was not to be read in the sense of making null and void with effect as if that sentence had never been passed. Section 4 (3) of the Criminal Appeal Act, 1907, provided that the Court of Criminal Appeal, if they were of opinion that the sentence was too severe, should " quash " that sentence and pass such other sentence as they thought ought to be passed in substitution therefor. The proper construction of that section was that the former sentence was rendered null and void at the moment when the court decided to substitute a different sentence, so as to make the earlier sentence of no effect for the future. Thus the length of H.'s sentence in the present case was seven years from the date in 1955 when he was sentenced to ten years' imprisonment; and it was fallacious to regard that sentence as one which was to last for only two-thirds of that period. A sentence of imprisonment was a sentence for the period stated by the court and it was only by virtue of an administrative rule that a prisoner who behaved himself would normally be discharged after serving two-thirds of his sentence. In the present case H., having served two-thirds of his sentence, had become eligible to be considered for discharge, but that question was a matter within the unfettered discretion of the Prison Commissioners. [H. P.]

Commentary. The effect of the decision seems to be that, when a longer sentence is quashed and a shorter substituted for it, the prisoner is to be treated as if he had been serving the shorter sentence throughout.

SEXUAL OFFENCES

Indecent assault on child—corroboration

See R. *v.* THOMAS, p. 841, *ante.*

SHOPS

Sunday closing—shop open for viewing

Betta Cars Ltd. v. Ilford Corporation

Queen's Bench Divisional Court: Lord Parker C.J., Ashworth and Hinchcliffe JJ.: 103 S.J. 834.[17]

Car dealers were charged with having failed to close their shop for the serving of customers on a Sunday, contrary to section 47 of the Shops Act, 1950. The shop in question had been open in the sense that the doors of the shop were open; the cars had been pushed forward, so that they stood partly in the forecourt; the cars had prices marked on them; and there were notices relating to hire purchase exhibited in the shop. An employee had told the corporation's inspector that the shop was open for viewing only. On appeal against conviction,

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[17] For the car dealers: *A. E. Bolton.* For the Corporation: *G. T. Hesketh.*

Held, dismissing the appeal, that the shop could not be said to have been closed for the serving of customers as required by the Act.

Waterman v. *Wallasey Corporation* [1954] Crim.L.R. 554 distinguished. [D. C.]

Commentary. The effect of the proviso to section 47 is that a shop may lawfully be open on Sundays for certain purposes including the sale of accessories. In *Waterman's* case, the shop was lawfully open for that purpose and, in the window, motor-cars were displayed for sale with prices on them. Donovan J. said: "If a shop may lawfully be open as this one might, and someone inspects a motor-car which can lawfully be sold the next day, in our view, it is stretching the Act too far to say that the shop is open for the serving of customers who wish to buy a car."

TRIAL

Direction to acquit without direction as to the issues on which decision should be reached

R. v. Poole

Court of Criminal Appeal: Lord Parker C.J., Slade and Winn JJ.: June 22, 1959: *The Times,* June 23, 1959.[18]

P. was tried at the Central Criminal Court on an indictment charging office-breaking and larceny (with his brother) and, alternatively, receiving. P. pleaded not guilty and adduced evidence of an alibi. The jury acquitted P. of the principal offence but convicted him on the alternative count of receiving four stolen £1 notes. The trial judge, dealing with the receiving count, directed the jury as follows: "It is open to you to do so" (*i.e.*, to convict of receiving) "but I think you might take my advice on that particular point, that if you find P. not guilty on the first count in the indictment, then it would not be right for you to find him guilty on the second count; acquit him on the second count as well." On appeal to the Court of Criminal Appeal:

Held, allowing the appeal, that the judge's direction on the receiving count almost amounted to a direction to acquit; and, although P.'s explanation had been referred to, there was no specific direction as to the issues which the jury would have to decide on that count. Thus there was no specific direction as to what facts would constitute possession and control; nor as to the necessary state of knowledge at the time when the notes came into P.'s possession; nor as to P.'s right to be acquitted if the jury felt his explanation might be true. In the circumstances the conviction could not stand and the appeal would, therefore, be allowed.

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[18] For the appellant: *J. Yahuda* (instructed by F. E. Clifford). For the Crown: *J. H. Buzzard* (instructed by the Director of Public Prosecutions).

[H. P.]

Commentary. Proof of possession of goods recently stolen is sufficient evidence, in the absence of any explanation which might reasonably be true, for a jury to convict the possessor of receiving the goods knowing them to have been stolen: *R.* v. *Aves* (1950) 34 Cr. App.R. 159. This doctrine can only apply when it has been proved that the prisoner was in possession and the absence of any direction on what constitutes possession must have been fatal to the conviction in the present case. As the jury had had no direction on the constituents of receiving they may have convicted on a completely wrong view of the law.

Election to be tried by jury—second charge added to the indictment at quarter sessions

R. v. Greene

Court of Criminal Appeal: Hilbery, Havers and Thesiger JJ.: July 27, 1959: *The Times*, July 28, 1959.[19]

G. was charged before magistrates with an offence against section 3 of the Betting Act, 1853 (*i.e.*, being an occupier of an office used for the purpose of betting with persons resorting thereto). G. elected to be tried by jury at quarter sessions. At the sessions the indictment preferred against G. contained two counts, the first charging the offence under section 3 and the second charging an offence under section 4 (*i.e.*, using premises for the purpose of receiving money or other consideration as a promise or agreement to pay money on events relating to horse races). He was convicted on both counts and appealed to the Court of Criminal Appeal against his conviction on the second count.

Held, allowing the appeal, that as had been laid down in *R.* v. *Phillips* [1953] 2 Q.B. 14, where a defendant charged with a summary offence elects to be tried by a jury and is committed to sessions for that offence, no charges for other offences ought to be included in the indictment. In the present case not only did the conviction offend against the decision in *Phillips* but also the offence under section 4 was not an offence which could be tried at sessions. Accordingly the conviction on the second count would be quashed. [H. P.]

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[19] For the appellant: *Guy Dixon* (instructed by Robinson & Bradley for Evan Barlow, Son & Poyner, Leicester).

Commentary. By section 2 of the Administration of Justice (Miscellaneous Provisions) Act, 1933, where a person has been committed for trial, the bill of indictment against him may include, either in substitution for or in addition to counts charging the offence for which he was committed, any counts founded on facts or evidence disclosed in any deposition taken before a justice in his presence, being counts which may lawfully be joined in the same indictment.

The course adopted by the prosecution in the present case would have been within the express words of the statute had the offence under section 4 been triable at quarter sessions. Even if this objection had not been present, the course adopted is nevertheless condemned by the decision in *R.* v. *Phillips* (above) where Lord Goddard C.J. said:

" . . . this court cannot approve of such a course being taken because in reality it is turning the option that is given to a defendant by section 17 of the Summary Jurisdiction Act, 1879, into something in the nature of a trap. A person finds himself before the justices charged with an offence for which the maximum punishment is six months' imprisonment, elects to go for trial before a jury, and then finds that he is charged with a different offence, carrying heavier penalties, and one with which had he been convicted before the justices, he could not subsequently have been charged."

In the present case, the offence under section 4 in fact carried a smaller penalty (three months) than that for which he was committed for trial (six months) but as it was an additional and not a substituted charge the prisoner was equally prejudiced. Even if the charge had been a substituted one carrying a smaller penalty, it is thought that the same principle should prevail; the prisoner has elected to be tried by jury for a particular offence and not for any other offence.

Misdirection — invitation to jury to form an adverse view of defendant's silence when charged and cautioned

R. v. Davis

Court of Criminal Appeal: Lord Parker C.J., Ashworth and Edmund Davies JJ.: October 19, 1959: *The Times*, October 20, 1959.[20]

D. was convicted at quarter sessions of storebreaking and larceny. D. had been found assisting others to carry stolen goods from a van into the house where he lodged. When arrested and cautioned he said: "I am saying nothing." The deputy-chairman directed the jury as follows: "Members of the jury, a man is not obliged to say anything, but you are entitled to use your commonsense. If D. was in the position that he now would have you believe he was in, . . . would he say to the police 'I am saying nothing'?"; and later: "Can you imagine an innocent man who had behaved like that not saying something to the police in the course of the evening or the next day, or even a little time afterwards? He said nothing." D.'s explanation at the trial, in fact, was that he was innocently assisting in carrying the goods in. On appeal to the Court of Criminal Appeal on the ground of misdirection:

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[20] For the appellant: *Patricia Coles* (instructed by the Registrar, Court of Criminal Appeal). For the Crown: *E. A. Machin* (instructed by the Town Clerk, Nottingham).

Held, allowing the appeal, and following *R.* v. *Naylor* (1933) 23 Cr.App.R. 177, that the question in these cases was always whether there was an invitation to the jury to form an adverse view of the defendant from his silence when he was charged and cautioned. Where that had been done there was a misdirection. The comment made in the summing-up in the present case was inconsistent with innocence, and the conviction, therefore, could not stand. [H. P.]

Commentary. The cases seem to establish a rather subtle distinction between an invitation to the jury to treat the accused's silence as evidence against him (which is a misdirection) and an invitation to them to consider his silence as a relevant factor in determining the weight to be given to any defence which he may subsequently raise (which is a proper direction). *Naylor* was a fairly clear example of the former type as the prisoner's remark: "I do not wish to say anything except that I am innocent," was apparently (*cf.* Lord Hewart C.J. in *R.* v. *Littleboy* (1934) 24 Cr.App.R. 192) treated as evidence against him in corroboration of an accomplice. It was a strong case, moreover in that the remark was made in response to a caution by the magistrates, telling him that he was not obliged to say anything, and on the advice of a solicitor. In *Littleboy,* on the other hand, the conviction was upheld in spite of Avory J.'s comment that it was "unfortunate" that the alibi raised at the trial was not mentioned at the preliminary inquiry. *Cf.* also *R.* v. *Leckey* [1944] 1 K.B. 80; *R.* v. *Gerard* [1948] 1 All E.R. 205; 32 Cr.App.R. 132.

Principles of Punishment

Sentences in the Court of Criminal Appeal

Prepared by Henry Palmer, *Barrister-at-Law*

Imprisonment

In R. *v.* Norton the court (Barry, Diplock and Salmon JJ.: October 2, 1959) reduced a sentence of four years' imprisonment to one of two years' imprisonment. N. had pleaded guilty at quarter sessions to housebreaking and larceny. N., who was a man of thirty years of age, had thirteen previous convictions. N.'s younger brother, who was also concerned in the offence, had pleaded guilty thereto, had a somewhat better record and was sentenced to eighteen months' imprisonment. The court stated that, although N. had a worse record than his brother, the disparity between four years and eighteen months was far too great on the facts and N.'s sentence would, therefore, be reduced to two years' imprisonment.

In R. *v*. COTTON the court (Barry, Diplock and Winn JJ.: October 12, 1959) reduced a sentence of twelve months' imprisonment to one which would permit immediate release. C., with two others, had pleaded guilty at quarter sessions to an indictment charging conspiracy to defraud advertising contractors and their customers by falsely pretending that they " were engaged in a genuine business of advertising contractors, and that one or more of them were negotiating for the renewal of the existing advertising contracts as representatives of the successors to or agents for those to whom the said contracts had been made." C., who was a man of forty-six years of age, was of previous good character. He had been a prisoner-of-war in Japanese hands for three and a half years. The court stated that, owing to the wording of the conspiracy charge, the exact nature of the fraud never clearly emerged. It was apparent that C. at most had admitted giving to advertising contractors or their customers the impression that he was acting as a representative of former contractors. He had never admitted defrauding those persons in the sense of extracting money from them without any intention of doing the work. In view of the uncertainty of the exact nature of the offence to which C. had pleaded guilty and of his previous record (particularly the effect of his experiences as a prisoner-of-war upon his mental and physical health), the sentence would be reduced to one which would enable him to be discharged forthwith.

In R. *v*. THWAITES the court (Barry, Diplock and Winn JJ.: October 12, 1959) reduced sentences totalling eight years' imprisonment to a total of six years' imprisonment. T., who was a man of twenty-two years of age, had four previous convictions and had had sentences of probation, approved school and twelve months' imprisonment (from which he was released three months prior to the commencement of the present offences). T. had pleaded guilty at quarter sessions to storebreaking, possessing housebreaking implements by night, carrying an offensive weapon, assault on police officers in the execution of their duty (two cases) and asked for nineteen other offences to be taken into consideration. The court stated that the offences were of the utmost gravity; very large quantities of property had been stolen and the two assaults were of great brutality. The sentences would have been wholly appropriate but for the appellant's age. However, in view of T.'s age and for no other reason, the sentences would be reduced to a total of six years' imprisonment.

In R. *v.* POND the court (Lord Parker C.J., Ashworth and Edmund Davies JJ.: October 19, 1959) reduced a sentence of five years' imprisonment to one of three years' imprisonment. P. had pleaded guilty at quarter sessions to the larceny of a radio and a mains conversion set. P., who was a man of forty years of age, had nine previous convictions. In 1944 he was bound over for storebreaking. In 1945 he was sentenced to twelve months' imprisonment for a total of twenty-five offences. After two more convictions, for one of which he was bound over, he was sentenced in 1948 to three years' imprisonment for a total of ten offences. In 1951 he was sentenced to eighteen months' imprisonment. In 1954 he was fined. In 1955 he was sentenced to twelve months' imprisonment for a total of forty offences. Finally, in 1957, he was sentenced to three years' imprisonment for garage-breaking. The court stated that P. was well qualified for preventive detention and would certainly be so sentenced next time he committed an offence. However, if one imposed five years' imprisonment for the present offence it might well be said that P. was being sentenced on his previous record. In all the circumstances, that sentence was too high and a sentence of three years' imprisonment would, therefore, be substituted.

Preventive detention

In R. *v.* ASHWORTH the court (Barry, Diplock and Salmon JJ.: October 5, 1959) reduced a sentence of seven years' preventive detention to one of three years' imprisonment. A. had pleaded guilty to larceny in a dwelling-house, and was sentenced by quarter sessions. A., who was a man of thirty-three years of age, had fourteen previous convictions. His last sentence was of four years' imprisonment from which he was released in October, 1958. The present offence arose when A., having gone into a working-men's club, had the opportunity of going into the stewardess's house next door, where he stole a handbag. The court stated that, having regard to the fact that the offence appeared to have been unpremeditated, the sentence of preventive detention might be postponed.

The appropriate sentence was, in the opinion of the court, one of three years' imprisonment.

In R. *v*. DAVIES the court (Lord Parker C.J., Cassels and Edmund Davies JJ.: October 26, 1959) reduced a sentence of eight years' preventive detention to one of five years' preventive detention. D. had pleaded guilty to the larceny of a handbag and a clock. D., who was a man of sixty years of age, had thirty-nine previous convictions. The court stated that, although D.'s record would have justified a sentence of eight years' preventive detention, having regard to his age the sentence would be reduced to one of five years' preventive detention.

Corrective training

In R. *v*. FINNEY the court (Barry, Diplock and Winn JJ.: October 12, 1959) substituted a sentence of twelve months' imprisonment for a sentence of three years' corrective training. F., who was a man of twenty-four years of age, was sentenced at quarter sessions for pavilion-breaking and larceny (for which he had been formerly placed on probation) in consequence of a breach of probation. That offence was his first offence, but he was qualified for corrective training by reason of further offences of larceny and false pretences and unlawful sexual intercourse with a girl between the ages of thirteen and sixteen. It was while serving a sentence of three months' imprisonment imposed for the further offences that he was brought back to the quarter sessions and sentenced for the original offence. The court stated that at the time when F. was sentenced to corrective training he had not completed his first sentence of imprisonment and had had no opportunity of showing whether it had wrought an improvement in his character or not. In those circumstances a sentence of corrective training was inappropriate and a sentence of twelve months' imprisonment would, therefore, be substituted, that sentence to be consecutive to the sentence of three months' imprisonment.

Borstal training

In R. *v*. SMITH the court (Barry, Diplock and Winn JJ.: October 12, 1959) varied a sentence of Borstal training to one of twelve months' imprisonment. S., who was a young man of eighteen years of age, was of previous good character. He had been convicted of unlawfully wounding another young man by stabbing him twice with a "flick-knife." One of the wounds was in the chest and had penetrated in an oblique direction for two inches; the other wound was in the thigh and had penetrated for one and a half inches. The court stated that the conditions prescribed by section 20 of the Criminal Justice Act, 1948, for the imposition of Borstal training were: "Having regard to his character and previous conduct and to the circumstances of the offence, that it is expedient for his reformation and the prevention of crime." Having regard to S.'s previous exemplary conduct and to the terms of the section, this court could not say that a sentence of Borstal training was expedient for his reformation "having regard to his character and previous conduct." This was a serious offence and this court was of opinion that no other way of dealing with S. was appropriate other than by a sentence of imprisonment. Accordingly a sentence of twelve months' imprisonment would be substituted for the sentence of Borstal training.

Bind over

In R. *v.* MURRY-WALLACE the court (Barry, Diplock and Winn JJ.: October 12, 1959) substituted a bind over for sentences totalling three years' imprisonment. M., who was a man of twenty-nine years of age, had a bad record up to 1951. He had been to an approved school and to Borstal training, two years' imprisonment and, finally, five years' imprisonment in 1951 for office-breaking. M. had pleaded guilty at quarter sessions to larceny and false pretences; these offences having been committed in 1957 when he had obtained a car on hire-purchase and sold it. The court stated that this seemed to be a case where M. had made a strenuous attempt to keep straight and to reform his life. After his release from prison in 1954 he had obtained a job in a cinema. Unfortunately his record became known and the present offences were committed for the purpose of raising money to go with his wife to Canada. This he did, but again his record became known. When he returned to England in 1959 he was arrested for the present offences. While on bail he had obtained another job. In the very exceptional circumstances, this case could, in the opinion of the court, be dealt with by binding M. over to be of good behaviour for two years in the sum of £10.

Acts and Orders *

London Traffic

The following Order has been made detailing prescribed routes: S.I. No. 1566 (Westminster) (3d.).

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* Prepared by F. Maurice Drake, *Barrister-at-Law.*

Mental Health

Certain provisions of the Mental Health Act, 1959, were brought into operation on October 6, 1959. The effect of these are that as from that date hospitals, licensed homes and nursing homes may receive mentally ill patients informally without powers of detention. Certain provisions of the Lunacy Act, 1890, which hitherto rendered this impossible have been repealed accordingly. MENTAL HEALTH ACT, 1959 (COMMENCEMENT NO. 1) ORDER, 1959 (S.I. No. 1676) (2d.).

Scotland

New arrangements have been made for the sittings and distribution of business in the Sheriff Courts of Caithness. Previous Orders prescribing arrangements for these courts (S.R. & O., 1908, No. 260, and S.R. & O., 1926, No. 1562) are revoked. Operative October 1, 1959. SHERIFF COURTS (CAITHNESS) ORDER, 1959 (S.I. No. 1643) (2d.).

Practical Problems

All questions for consideration should be addressed to " The Editor, The Criminal Law Review, 11 New Fetter Lane, London, E.C.4." The questions of readers only are answerable in the Review. All questions should be submitted in triplicate. The Publishers cannot accept any responsibility for the correctness of the replies.

63. *Police bail*

We are concerned in a case where a client was arrested at 11.45 p.m., held in custody for about twelve hours and released the next day about 12.15 p.m. on bail under section 38 of the Magistrates' Courts Act, 1952, in his own recognizance of £5 to appear at the same police station five days later.

The incident in which he was involved was quite a simple one (discovered standing outside the broken window of a men's outfitters late at night, by a police squad car). He maintained his innocence and has a clear record. He is married with a fixed abode, and is in regular well paid employment. The police had established this within an hour of his arrest.

He was not charged when released, but was charged with simple larceny of an umbrella when he eventually reported to the police station some days later.

We think that the police had no power to bail him, since he had not been charged. We read section 38 sub-clauses (1) and (2) as being complementary, *i.e.* we do not think any extra powers are granted enabling the police to bail a person not charged with any offence to appear at a police station. Surely the power of the police to grant bail is limited to the conditions upon which bail can be granted by Magistrates? If one then turns to section 97, it states plainly that a warrant for a man's arrest for breach of recognizance can only be issued where he is charged with or convicted of an offence. We think this implies he can only be bailed if charged or convicted. [B. B.]

ANSWER

The power to bail for appearance at a police station derives from section 38 (2), which begins with the words: 'Where, on a person's being taken into custody for an offence without a warrant . . .". The term "charge" is not used, and it would not appear necessary for any document concerning the alleged offence to be prepared. But an arrest without a warrant is unjustifiable if the charge is not made known to the person arrested—unless it must in the circumstances, have been known by him (see *Christie* v. *Leachinsky* [1947] A.C. 573).

The point made on section 97 is not a good one because section 38 (2) specifically enacts that a recognizance taken under it may be enforced "as if it were conditioned for the appearance of that person before a magistrates' court." It does not say "for the appearance of that person before a magistrates' court on a charge." [A. E. J.]

Letters to the Editor

D. P. P. v. Roffey

Sir,

With reference to the report of the above case in your April issue and the Commentary thereon I should be most obliged if the learned Editor of the Commentary would indicate his views on the following proposition:

(a) That nothing should be read into a statute which is not there (*i.e.*, those whose task it is to construe must be guided by what it says rather than what is intended); and

(b) Being a penal statute it must be construed strictly.

If these canons are no longer tenable would he be kind enough to refer me to some authority on the point.

Yours faithfully,
E. P. FULLBROOK.

Reading, Berks

[Professor J. C. Smith writes: "Proposition (a) is certainly generally accepted as the right approach to the construction of statutes (though it is not invariably followed: *cf. Billing* v. *Pill* (below)) but it does not seem, with respect, to have anything to do with the case referred to. The court did not read into a statute something which was not there, but merely interpreted—in my opinion, reasonably—a word which was there.

Proposition (b) is one to which lip-service is often paid but which is commonly ignored in practice. Thus in *Billing* v. *Pill* [1954] 1 Q.B. 70 the words 'attached to or forming part of the realty' were held by the Divisional Court to mean 'attached so as to form part . . .' in order to uphold a conviction. *Cf.* '*Stealing a Hut*' [1955] Crim. L.R. 404, and the commentary on *Woodward* v. *Koessler* [1958] Crim. C. & C. 86. It is not clear, however, that there was any departure from proposition (b) in the present case. As Dr. Glanville Williams says, 'If there are two reasonable constructions, the court need not give a more lenient one if it can be shown that the wider construction is *more* reasonable than the lenient one: that is to say if it accords better with the apparent purpose of the Act.' (*The Criminal Law*, p. 447.)"]

Advance Notice of the Defence

Sir,

The problem raised by Dr. Williams in his article on "Advance Notice of the Defence," published in the August issue is of prime importance for the administration of justice. But it seems to me that its solution does not lie in the direction suggested by the author. His suggestion raises at least two difficulties: first, what would be the sanction for non-compliance with the obligation to give adequate advance notice? Inadmissibility of the defence or the evidence in its support? This would seem a gross injustice, which the legal conscience, at least in Anglo-Saxon jurisprudence, will not support. We treat prosecution and defence differently in this respect, and justly so. We allow a prosecution to fail for non-compliance with rules of procedure, and let a guilty man go unpunished, but would not allow a defence to fail for such a reason and risk the conviction of an innocent man. *Lawson* v. *H.M. Advocate* (1943) 7 J.C.L. 292, referred to by Dr. Williams, shows pretty vividly how close to dangerous ground such a measure may lead. Secondly, it may prejudice the layman who appears without a counsel.

It seems that a simple way to solve the problem would be to allow an adjournment of the hearing to facilitate an adequate investigation by the prosecution of a plea or piece of evidence offered in surprise by the defendant. The difficulty lies, of course, in the system of trial by jury, which generally renders an adjournment of the hearing in an advanced stage of the trial highly impracticable. The adequacy of trial by jury to give better justice is the fundamental issue which must be solved before a solution of the present problem, as well as of a few others, may be reached. And indeed, that adequacy has been challenged for a long time. "Whether a criminal trial is in the nature of a game or sporting contest, or whether it is a serious inquiry aiming to distinguish between guilt and innocence," as Dr. Williams puts it, is not the real issue; for even if it be regarded as a sporting contest, fairness would demand discovery of the weapons of the defence once the prosecution is required to show its hand.

Yours faithfully,
M. SHALGI.

Jerusalem.

Books and Periodicals

Book reviews:

The Child and The Court. By W. E. Cavanagh. London: Victor Gollancz, Ltd. 1959. 239 pp. 21s. net.

Persons, considering the courts which deal with children's cases, tend to approach the matter from the aspect with which they are most familiar. Mrs. Cavanagh, who makes this comment (p. 16), would seem to have approached the writing of this book as a magistrate, if her description as a Lecturer in Social Studies did not indicate otherwise.

Without doubt, Chapters 3 and 5 are the essence of this book and well worth study. The former, Juvenile Court Procedure, is perhaps dry; but it very adequately traces the development of the more important modern provisions relating to juveniles and juvenile courts. Particular emphasis is given to the Report of the Committee on Young Offenders, 1927, and its considerable influence on the modern law in this connection. Chapter 5, The Juvenile Court at Work, is a skilful assessment of the problems, which face these courts today, in particular, the reference to the outlook and language of a child, which is so different to the adult, and the problem of that child's feeling of guilt in respect of an offence against the law (pp. 132–137). " It is possible and even probable that a proportion of the children coming before the court did not know that what they were doing was wrong in the sense that an adult would have known this. . . . If the child is fortunate in his family background he will find himself in line with society generally. If not, he may nevertheless conform with most of the requirements of the law as soon as he is intellectually aware of what they are, though in his own personality he makes no real response to them " (p. 134). The discussion on the Juvenile Liaison Officer schemes, which follows upon this observation, is very sympathetically handled. This is no plea for the soft handling of juveniles but a careful analysis of the present difficulties. The author makes her point of view clear when she observes that " the Juvenile Court, as at present constituted, is still a court of law and not a kind of welfare clinic," despite the emphasis on education and welfare in the Children and Young Persons Act, 1933 (p. 121).

Apart perhaps from too tentative an approach to controversial problems, the faults in this book lie in its arrangement and the lack of an index as a guide. All that is provided is a Table of Contents giving the chapter headings. Chapters 1 and 2 are concerned with the Magistrates' Court as opposed to the Juvenile Court. The author's reason for this approach is given in Chapter 5: " in order to understand the place in the administration of justice of the Juvenile Court presupposes some familiarity with the procedure of the adult court " (p. 121). This is all very well for readers, who know nothing of the law and its administration; but it is tedious for the lawyer and irritating for the person who expects to come to grips at once with the child and the court, before which he appears.

Chapter 4 is an able and adequate description of the powers of the Juvenile Court and the final chapters, though repetitive in some respects are well worth study. In any case, Chapters 3 and 5 make this book a most useful addition to the literature on the subject and one to be recommended.

T. E. James.

The Problem of Delinquency. Edited by Sheldon Glueck, Roscoe Pound Professor of Law, Harvard University. Boston: Houghton Mifflin Co., The Riverside Press, Cambridge. 1959. xvi and 1,183 pp. (incl. Contributors 14 pp. and Index 21 pp.). 60s. net.

This book is primarily for use in University Law Schools; but it is also designed for other Departments, such as Sociology, Psychology and Education. Prior to publication, much of the contents was tried out by Professor Glueck on third year and postgraduate law students in Seminars on the Problem of Delinquency at the Harvard Law School. Apart from the editor's comments, it consists of a number of published articles and extracts from books " which are not only sound in content but which lend themselves most readily to the art of pedagogy " (p. vii).

There are four parts to this compilation and all but Part I, dealing with Theories and Findings regarding " Causes," are almost exclusively concerned with the juvenile delinquent. Clearly, any factors causing or precipitating crime are traceable to youth of school age, at least, who must take pre-eminence in considerations of the problem of delinquency. Professor Glueck, who has selected the articles and edits the collection, regards it as a " teaching instrument " and a stimulant to Law Schools throughout the U.S.A. to introduce courses on child delinquency. It follows that it is written primarily for the student of the American scene, although Part I is of interest to all students of crime and its treatment. There are, of course, references to other countries and a few comments on the British system, especially in Part 2: The Juvenile Court and the Law and Part 3: Treatment.

In this country therefore the chief interest in this book will be threefold: as an illustration of a method of teaching law students, in particular, something of the problems of child delinquency; as an encyclopaedia of knowledge on the subject, for reference purposes and occasional reading; and as an inquiry into the material which Professor Glueck finds worthy of inclusion.

There are grave drawbacks to this kind of approach. Perhaps the most serious is the lack of enthusiasm and interest which a writer can convey to his reader in the course of a book entirely from his own pen. Articles from journals are frequently and of necessity verbose, since they have to introduce themselves before going to the meat of the matter. Moreover, when these articles are collected together there is inevitably a lot of overlapping and repetition. Of course, the book is not designed to be read from cover to cover; it is intended for discussion and debate. Even as such, the length of the articles are alarming and sometimes the meaning is difficult to follow (see p. 304, for example).

Nevertheless, for the teacher and student in this country sections of this book will be of considerable value; for example, the articles on Mental Testing by Harry M. Shulman (p. 75) and Sheldon and Eleanor

Glueck (p. 86), material on the treatment of youths over Juvenile Court age (pp. 520–535), and the section on Group Therapy (pp. 871–939). However, it must be emphasised that the latter may deter British students by its length. This is to be regretted for Professor Glueck's arrangement of the material is of particular interest; he treats first of group therapy, then of boys gangs and finally of camp as a group experience. So much is stated in the introductory passages; but the contributions need to be read for the proper appreciation of the arrangement. The article on The Integration of Group and Individual Therapy (p. 899), where group treatment for children around the age of nine and even younger is described, deserves attention. The view has been expressed in this country, at any rate, that the techniques of group treatment are not amenable to children below the ages of ten or eleven. A contribution of topical interest to us, having regard to the Liverpool Police Liaison Scheme and unpublished work by some police forces in Scotland, is Casework Treatment in a Police Setting by Jacob Chwast (p. 1132). The weakness of this book is, however, well illustrated by this article, which refers to "policemen and policewomen specially selected and trained." There is no description of the training requirements and, in a Seminar here, this would be one of the main points of discussion, especially since one of the chief objections voiced by the critics of the Liverpool Scheme is the inroad on the duties of the social worker by the police.

Unfortunately, it is unlikely that this book will stimulate law schools in this country to action in the field of juvenile problems. However, it will encourage those who are concerned to introduce material of this kind into courses on, for example, criminology, sociology or psychology. Apart from any other consideration, however, it will be a valuable book of reference. Moreover, both the editorial comments and the extracts from the many works of Sheldon and Eleanor Glueck are replete with the wisdom and knowledge which, in this country, we have learnt to expect.

T. E. JAMES.

Police Law. Fifteenth Edition. By C. C. H. Moriarty and W. J. Williams. Butterworth & Co. 552 pp. and (indices) 72 pp. 15s. 6d. net.

What can one say of a book that has reached fifteen editions and a multiplicity of impressions with no substantial change in its original format? Its only alterations have been those amendments to the text necessitated by new statutes or judicial decisions.

For the purpose for which it is intended, this book has never been bettered. Attempts have been made to replace it with more elaborate, more expensive and even more numerous volumes, but "Moriarty" goes steadily on. Since the war, it has been the standard textbook for all Police District Training Centres; a measure of its unrivalled position.

Whilst more ambitious police students may look down their noses a little at it, we are always reminded of the solicitor of our acquaintance who swore by it and even carried a copy of the latest edition into court with him!

The original editor has died since the last edition, although it is understood that he had approved the amendments in this edition before his death. We can only hope that in his difficult task of keeping up with the changing face of legislation, the new editor (Lt. Col. W. J.

Williams, O.B.E., B.SC., LL.B., the Chief Constable of Gwynedd) never loses the simplicity of design and ease of reference, which has always been the book's outstanding virtue.

H. V. H.

Books received:

Trial for Treason. By G. W. Keeton, M.A., LL.D. London: Macdonald & Co. 1959. 252 and (index) 4 pp. 21s. net.

The Campden Wonder. Edited by Sir George Clark. Oxford University Press. 1959. 151 and (index) 3 pp. 18s. net.

Causation in the Law. By H. L. A. Hart and A. M. Honoré. Clarendon Press: Oxford University Press. 1959. 441 and (biblio. and index) 13 pp. 55s. net.

Phipson's Manual of Evidence. Eighth Edition by D. W. Elliott. London: Sweet & Maxwell. 1959. 260 and (index) 9 pp. 35s. net.

Elements of English Law. By William Geldart. Sixth edition revised by Sir William Holdsworth and H. G. Hanbury. Oxford University Press. 1959. 208 and (biblio. and index) 14 pp. 7s. 6d. net.

A Handbook for Licensing Justices. By J. Whiteside, O.B.E. London. Magistrates' Association. 1959. 101 and (index) 7 pp.

Readers' digest:

Evidence: Cross-examination of accused as to character: 109 *Law Journal* 568.

Homicide: The defence of provocation: 27 *Medico-Legal Journal* 57.

Recognisances: Recognisances at common law: 228 *Law Times* 188.

Road Traffic: Restriction on prosecution—2: 228 *Law Times* 161.

Shops: Mobile shops: 103 *Solicitors' Journal* 806.

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Books for review should be sent to the Publishers at the above address.

Glossary

[Guide to pronunciation. Pronounce each syllable slowly as an ordinary English word, accenting the part in italics. Then repeat the whole phrase quickly but keep each sound distinct. Where at the end of a syllable the letter "r" appears in brackets (r), do not roll it. The letter "a" by itself is long, as in bay.]

A fortiori—so much the more so, with greater reason [a for-she-*or*-eye].

Ab initio—from the beginning [ab in-*ish*-ee-oh].

Actus reus—guilty act [*act*-us *ree*-us].

Aliunde—from elsewhere [allie-undee].

Animus furandi—intent to steal [*an*-imus fure-*and*-eye].

De novo—anew [dee no-voh].

Durante minore aetate—during the age of minority [dure-*ant*-ee my-*nor*-ee eye-*tay*-tee].

Ejusdem generis—of the same kind or nature [*ee*-juss-dem *gen*-er-iss].

Ex hypothesi—following from this assumption [ex high-*poth*-ess-eye].

Ex post facto—by a subsequent fact, retrospectively [ex post *fact*-oh].

Fons et origo—the source and origin [fons et orry-go].

Functus officio—having discharged his duty [*funk*-tus off-*ish*-ee-oh].

In camera—the hearing of a case in private [in camera].

In extenso—in full [in ex-*ten*-so].

In favorem libertatis—in the interest of freedom [in *fay*-vor-em lib-er-*tay*-tise].

In integrum—in entirety [in in-*teg*-rum].

In pari materia—in an analogous case [in parry mat-*ear*-ea(r)].

Inter alia—among other things [in-ter *a*-lea(r)].

Invito domino—against the will of the owner [in-*vee*-toe *dom*-in-oh].

Locus in quo—the place in which [*lock*-us in quoh].

Mens rea—guilty mind [mens rea(r)]

Modus operandi—method of working [*mode*-us op-e-*rand*-eye].

Obiter dictum—a mere saying by the way, a chance remark, which is not binding on the court [*oh*-bitter *dick*-tum].

Omnia praesumuntur rite esse acta—all acts are presumed to have been done rightly [*om*-nea(r) pre*sume*-unter *ree*-tay *essay acte*(r)].

Onus probandi—burden of proving [*oh*-nus pro-*band*-eye].

Per curiam—by the court [per *cure*-ree-am].

Per pro—on behalf of [per proh].

Per se—in itself [per see].

Propria manu—by his own hand [proh-prea(r) *man*-u].

Ratio decidendi—the reason or ground of a judicial decision [ray-*she*-oh *dee*-sid-end-eye].

Res gestae—the facts surrounding or accompanying a transaction which is the subject of a legal proceeding [rees *jest*-ee].

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Spring Assizes, 1959

First Working Days

North Eastern Circuit (Stable, Streatfeild and Collingwood JJ.)

April
8: Leeds

Northern Circuit (Wallington, Pearson and Thesiger JJ.)

April
2: Liverpool
21: Manchester

Central Criminal Court, 1959

First Working Days

April 14 May 26

County Quarter Sessions

	April
Bedfordshire	6
Berkshire	6
Buckinghamshire	6
Caernarvonshire	2
Cambridgeshire	3
Cardiff	20
Cardiganshire	2
Carmarthenshire	10
Cheshire (Chester)	13
Cheshire (Knutsford)	7
Cornwall	7
Denbighshire (Denbigh)	3
Derbyshire	8
Devonshire	1
Dorset	1
Essex	8
Essex (Appeals)	21
Flintshire	2
Hampshire	1
Hereford	6
Hertfordshire (St. Albans)	6
Hertfordshire (St. Albans) (Appeals)	7
Huntingdonshire	7
Isle of Ely (Ely)	1

	April
Isle of Wight	8
Kent, East	6
Kent, West	13
Lincolnshire (Lindsey)	28
Lincolnshire (Parts of Holland: Spalding)	2
Lincolnshire (Parts of Kesteven: Sleaford)	9
Merioneth (Bala)	7
Monmouthshire	1
Montgomeryshire (Newtown)	2
Norfolk (King's Lynn)	8
Nottinghamshire (Nottingham)	6
Oxfordshire	7
Pembrokeshire	6
Peterborough, Soke of	9
Rutland	3
Shropshire	1
Somerset (Wells)	1
Suffolk, West	7
Sussex, West	9
Westmorland	3
Winchester	2
Worcestershire	8

	May
Cambridge	29
Essex	6
Essex (Appeals)	21
Hereford	8
Hertfordshire (Hertford)	19, 25
Hertfordshire (Hertford) (Appeals)	26

	May
Kent, East	11
Kent, West	25
Nottinghamshire (Newark)	11
Pembrokeshire	11
Sussex, West	14

CALENDAR

BOROUGH QUARTER SESSIONS

	April		April
Birkenhead	20	Margate	24
Blackburn	7	Newark	22, 23
Bradford	1	Newcastle-under-Lyme	15
Bridgwater	24	Oldham	8
Croydon	10	Poole	13
Deal	17	Reading	15
Derby	15	Rotherham	3
Dover	3	Sheffield	1
Folkestone	18	Sunderland	22
Grantham	13	Swansea	1
Gravesend	9	Wigan	6
Maidstone	24	Wolverhampton	8
	May		May
Andover	12	Dudley	28
Banbury	26	Southend-on-Sea	11
Croydon	29		

Calendar

SUMMER ASSIZES, 1959

First Working Days

South Eastern Circuit (Stable and Pilcher JJ.)

May	*June*	*July*
8: Huntingdon	2: Norwich	7: Maidstone
12: Hertford	16: Chelmsford	17: Lewes
20: Cambridge	30: Kingston	
26: Bury St. Edmunds		

Wales and Chester Circuit (Pearson, Wrangham and Edmund Davies JJ.)

May	*June*	*July*
4: Dolgellau	12: Presteign	2: Swansea
7: Caernarvon	15: Brecon	
14: Beaumaris	18: Lampeter	
20: Ruthin	22: Haverfordwest	
25: Mold	25: Carmarthen	
28: Chester		

Western Circuit (Streatfeild, Donovan and Karminski JJ.)

May	*June*	*July*
12: Salisbury	2: Bodmin	7: Winchester
19: Dorchester	9: Exeter	
26: Taunton	23: Bristol	

Northern Circuit (Sachs, Ashworth, Hinchcliffe and Thesiger JJ.)

May	*June*	*July*
15: Appleby	2: Lancaster	7: Manchester
20: Carlisle	16: Liverpool	

Oxford Circuit (Cassels and Elwes JJ.)

May	*June*	*July*
5: Reading	4: Newport	7: Birmingham
12: Oxford	16: Hereford	
20: Worcester	23: Shrewsbury	
26: Gloucester	30: Stafford	

Midland Circuit (Jones, Havers and Davies JJ.)

May	*June*	*July*
5: Bedford	9: Derby	7: Birmingham
12: Northampton	16: Nottingham	
20: Leicester	30: Warwick	
27: Oakham		
28: Lincoln		

North Eastern Circuit (Barry, Diplock, Paull and Hewson JJ.)

May	*June*	*July*
12: Newcastle	9: York	7: Leeds
26: Durham	23: Sheffield	

CALENDAR

CENTRAL CRIMINAL COURT

First Working Days

May 26 June 16

COUNTY QUARTER SESSIONS

	May
Cambridge	29
Essex	6
Essex (Appeals)	21
Hereford	22
Hertfordshire (Hertford)	19, 25
Hertfordshire (Hertford) (Appeals)	26

	May
Kent, East	11
Kent, West	25
Lichfield	11
Nottinghamshire (Newark)	11
Oxford	29
Pembrokeshire	11
Sussex, West	14

	June
Anglesey	23
Bedfordshire	29
Berkshire	29
Buckinghamshire	29
Cheshire (Chester)	24
Cheshire (Knutsford)	29
Cornwall	30
Cumberland	30
Derbyshire	24
Essex	3
Essex (Appeals)	25
Gloucestershire	24
Hampshire	22
Hertfordshire (Hertford)	29
Hertfordshire (Hertford) (Appeals)	30

	June
Isle of Wight	10
Kent, East	29
Leicestershire	8
Lincolnshire (Parts of Holland: Boston)	29
Merioneth (Bala)	30
Norfolk (Norwich)	24
Northamptonshire	11
Nottinghamshire (Nottingham)	11
Oxfordshire	29
Rutland	10
Suffolk, West	23
Sussex, West	25
Warwickshire	16
Yorkshire, East Riding	16
Yorkshire, West Riding	22

BOROUGH QUARTER SESSIONS

	May
Andover	12
Banbury	26
Croydon	29

	May
Dudley	28
Southend-on-Sea	11
Smethwick	6

	June
Abingdon	3
Devizes	5
Poole	22

	June
Rochester	22
Shrewsbury	9

Calendar

SUMMER ASSIZES, 1959

First Working Days

South Eastern Circuit (Stable and Pilcher JJ.)

June	*July*
2: Norwich	7: Maidstone
16: Chelmsford	17: Lewes
30: Kingston	

Wales and Chester Circuit (Pearson, Wrangham and Edmund Davies JJ.)

June	*July*
12: Presteign	2: Swansea
15: Brecon	
18: Lampeter	
22: Haverfordwest	
25: Carmarthen	

Western Circuit (Streatfeild, Donovan and Karminski JJ.)

June	*July*
2: Bodmin	7: Winchester
9: Exeter	
23: Bristol	

Northern Circuit (Sachs, Ashworth, Hinchcliffe and Thesiger JJ.)

June	*July*
2: Lancaster	7: Manchester
16: Liverpool	

Oxford Circuit (Cassels and Elwes JJ.)

June	*July*
4: Newport	7: Birmingham
16: Hereford	
23: Shrewsbury	
30: Stafford	

Midland Circuit (Jones, Havers and Davies JJ.)

June	*July*
9: Derby	7: Birmingham
16: Nottingham	
30: Warwick	

North Eastern Circuit (Barry, Diplock, Paull and Hewson JJ.)

June	*July*
9: York	7: Leeds
23: Sheffield	

CENTRAL CRIMINAL COURT

First Working Days

June 16 July 7

CALENDAR

COUNTY QUARTER SESSIONS

	June		June
Anglesey	23	Isle of Wight	10
Bedfordshire	29	Kent, East	29
Berkshire	29	Leicestershire	8
Buckinghamshire	29	Lincolnshire (Parts of Holland: Boston)	29
Cheshire (Chester)	24	Merioneth (Bala)	30
Cheshire (Knutsford)	29	Norfolk (Norwich)	24
Cornwall	30	Northamptonshire	11
Cumberland	30	Nottinghamshire (Nottingham)	11
Derbyshire	24	Oxfordshire	29
Essex	3	Rutland	10
Essex (Appeals)	25	Suffolk, West	23
Gloucestershire	24	Sussex, West	25
Hampshire	22	Warwickshire	16
Hertfordshire (Hertford)	29	Yorkshire, East Riding	16
Hertfordshire (Hertford) (Appeals)	30	Yorkshire, West Riding	22

	July		July
Caernarvonshire	2	Kent, West	20
Cambridgeshire	3	Lincolnshire	2
Cardiganshire	2	Lincolnshire (Parts of Kesteven: Stamford)	9
Carmarthenshire	10	Monmouthshire	1
Denbighshire (Colwyn Bay)	3	Montgomeryshire (Newtown)	2
Devonshire	1	Norfolk (King's Lynn)	8
Dorset	1	Nottinghamshire (East Retford)	27
Essex	1, 28	Pembrokeshire	6
Essex (Appeals)	21	Peterborough, Soke of	2
Flintshire	9	Shropshire	1
Hereford	6	Somerset (Taunton)	1
Hertfordshire (Hertford)	28	Westmorland	3
Hertfordshire (St. Albans)	27	Wiltshire (Warminster)	1
Hertfordshire (St. Albans) (Appeals)	28	Winchester	30
Huntingdonshire	7	Worcestershire	8
Isle of Ely (Wisbech)	1		

BOROUGH QUARTER SESSIONS

	June		June
Abingdon	11	Rochester	22
Devizes	5	Sheffield	8
Poole	22	Shrewsbury	9

	July		July
Andover	14	Gravesend	2
Bridgewater	24	Maidstone	24
Bristol	27	Margate	24
Canterbury	4	Newark	15, 16
Croydon	16	Reading	15
Deal	24	Southampton	20
Dover	11	Southend-on-Sea	13
Folkestone	4	Swansea	29
Grantham	6		

Calendar

SUMMER ASSIZES, 1959

First Working Days

South Eastern Circuit (Stable and Pilcher JJ.)

July
7: Maidstone
17: Lewes

Wales and Chester Circuit (Pearson, Wrangham and Edmund Davies JJ.)

July
2: Swansea

Western Circuit (Streatfeild, Donovan and Karminski JJ.)

July
7: Winchester

Northern Circuit (Sachs, Ashworth, Hinchcliffe and Thesiger JJ.)

July
7: Manchester

Oxford Circuit (Cassels and Elwes JJ.)

July
7: Birmingham

Midland Circuit (Jones, Havers and Davies JJ.)

July
7: Birmingham

North Eastern Circuit (Barry, Diplock, Paull and Hewson JJ.)

July
7: Leeds

CENTRAL CRIMINAL COURT
First Working Days

July 7

COUNTY QUARTER SESSIONS

	July
Caernarvonshire	2
Cambridgeshire	3
Cardiganshire	2
Carmarthenshire	10
Denbighshire (Colwyn Bay)	3
Devonshire	1
Dorset	1
Essex	1, 28
Essex (Appeals)	21
Flintshire	9
Hereford	6
Hertfordshire (Hertford)	28
Hertfordshire (St. Albans)	27
Hertfordshire (St. Albans) (Appeals)	28
Huntingdonshire	7
Isle of Ely (Wisbech)	1

	July
Kent, West	20
Lincolnshire	2
Lincolnshire (Parts of Kesteven: Stamford)	9
Monmouthshire	1
Montgomeryshire (Newtown)	2
Norfolk (King's Lynn)	8
Nottinghamshire (East Retford)	27
Pembrokeshire	6
Peterborough, Soke of	2
Shropshire	1
Somerset (Taunton)	1
Westmorland	3
Wiltshire (Warminster)	1
Winchester	30
Worcestershire	8

	August
Cambridge	7
Cardiff	5
Essex (Appeals)	25

	August
Kent, East	24
Pembrokeshire	17
Sussex, West	6

BOROUGH QUARTER SESSIONS

	July
Andover	14
Blackburn	14
Bridgewater	24
Bristol	27
Canterbury	4
Croydon	16
Deal	24
Dover	11
Folkestone	4
Grantham	6
Gravesend	2
Kingston Upon Hull	6
Lincoln	6

	August
Deal	7

	July
Maidstone	24
Margate	24
New Sarum	3
Newcastle-Under-Lyme	10
Newark	15, 16
Plymouth	7
Reading	15
Southampton	20
Southend-on-Sea	13
Sunderland	28
Swansea	29
Wigan	24

Calendar

Autumn Assizes, 1959

First Working Days

South Eastern Circuit (Streatfeild and Hinchcliffe JJ.)

October		*November*		*December*	
Hertford	6	Chelmsford	3	Lewes	8
Cambridge	13	Kingston	17		
Bury St. Edmunds	20	Maidstone	24		
Norwich	27				

Wales and Chester Circuit (Byrne, Karminski and Davies JJ.)

October		*November*	
Caernarvon	3	Brecon	7
Ruthin	13	Carmarthen	12
Chester	21	Cardiff	19

Western Circuit (Devlin, McNair and Marshall JJ.)

October		*November*		*December*	
Devizes	6	Exeter	3	Winchester	1
Dorchester	13	Bristol	17		
Taunton	20				
Bodmin	27				

Northern Circuit (Jones, Ashworth, Phillimore and Winn JJ.)

October		*November*	
Carlisle	6	Manchester	24
Lancaster	15		
Liverpool	27		

Oxford Circuit (Pilcher and Finnemore JJ.)

October		*November*		*December*	
Reading	2	Newport	3	Birmingham	1
Worcester	9	Hereford	11		
Oxford	20	Shrewsbury	17		
Gloucester	27	Stafford	24		

Midland Circuit (Stable, Glyn-Jones and Hewson JJ.)

October		*November*		*December*	
Aylesbury	2	Derby	3	Birmingham	1
Bedford	6	Nottingham	10		
Northampton	13	Warwick	24		
Leicester	20				
Lincoln	27				

North Eastern Circuit (Slade, Wrangham, Elwes and Thesiger JJ.)

October		*November*		*December*	
Newcastle	6	York	3	Leeds	1
Durham	20	Sheffield	17		

Calendar

Central Criminal Court

First Working Day

October 14

County Quarter Sessions

	October
Cambridgeshire	2
Cardiganshire	1
Carmarthenshire	2
Cheshire (Chester)	12
Cheshire (Knutsford)	6
Denbighshire (Wrexham)	2
Derbyshire	13
Dorset	7
Essex	28
Essex (Appeals)	20
Hereford	5
Huntingdonshire	6
Isle of Ely (Ely)	7
Kent, East	5
Kent, West	19

	October
Leicestershire	12
Lincolnshire (Parts of Holland: Spalding)	8
Lincolnshire (Parts of Kesteven: Sleaford)	15
Lincolnshire (Lindsey)	15
Monmouthshire	7
Norfolk (King's Lynn)	12
Nottinghamshire (Nottingham)	5
Oxfordshire	26
Pembrokeshire	5
Peterborough, Soke of	8
Westmorland	2
Yorkshire, West Riding	12

	November
Cambridge	20
Essex (Appeals)	24
Hereford	20
Hertfordshire (Hertford)	16, 24
Hertfordshire (Hertford) (Appeals)	17

	November
Kent, East	9
Nottinghamshire (Newark)	5
Pembrokeshire	16
Sussex, West	5

Borough Quarter Sessions

	October
Andover	27
Bridgwater	23
Bristol	5
Canterbury	10
Croydon	15
Folkestone	10
Grantham	12

	October
Gravesend	1
Margate	9
Newark	22, 23
Newcastle-under-Lyme	6
Plymouth	6
Reading	14
Rotherham	5

	November
Croydon	26
Deal	20
Devizes	27

	November
Maidstone	9
Southend-on-Sea	9
Swansea	4

Calendar

APPOINTED DAY

January 1, 1959

Naval Discipline Act, 1957. See [1957] Crim.L.R. 691 and p. 65, *post.*

Opticians Act, 1958, ss. 1, 5, 7 (1), (3), (5), 8, 17–19, 25–31, Sched. See [1958] Crim.L.R. 631 and p. 66, *post.*

Trading Representatives (Disabled Persons) Act, 1958, s. 1. See [1958] Crim.L.R. 704.

WINTER ASSIZES, 1959

First Working Days

South Eastern Circuit (Jones and Finnemore JJ.)

January	*February*	*March*
9: Huntingdon	3, 7: Norwich	3: Maidstone
13: Hertford	10: Chelmsford	13: Lewes
20: Cambridge	24: Kingston	
27: Ipswich		

Wales and Chester Circuit (Barry, Davies and Edmund Davies JJ.)

January	*February*	*March*
14: Welshpool	3: Mold	2: Haverfordwest
16: Dolgellau	6: Chester	5: Carmarthen
20: Caernarvon	20: Presteign	12: Cardiff
26: Beaumaris	23: Brecon	
28: Ruthin	26: Lampeter	

Western Circuit (Cassels, Slade and Stevenson JJ.)

January	*February*	*March*
14: Devizes	3: Bodmin	10: Winchester
20: Dorchester	10: Exeter	
27: Taunton	24: Bristol	

Northern Circuit (Wallington, Pearson, Salmon and Elwes JJ.)

January	*February*	*March*
14: Appleby	10: Liverpool	3: Manchester
16: Carlisle		
27: Lancaster		

Oxford Circuit (Hilbery and Stable JJ.)

January	*February*	*March*
13: Reading	3: Gloucester	3: Stafford
20: Oxford	10: Newport	10: Birmingham
27: Worcester	18: Hereford	
	24: Shrewsbury	

Midland Circuit (Byrne, Collingwood and Havers JJ.)

January	*February*	*March*
14: Aylesbury	3: Lincoln	3: Warwick
16: Bedford	10: Derby	10: Birmingham
21: Northampton	17: Nottingham	
27: Leicester		
31: Oakham		

North Eastern Circuit (Donovan, Glyn-Jones, Wrangham and Thesiger JJ.)

January	*February*	*March*
14: Newcastle	10: York	10: Leeds
27: Durham	24: Sheffield	

CENTRAL CRIMINAL COURT, 1959

First Working Days

January 6, 27 February 17

COUNTY QUARTER SESSIONS

	January
Bedfordshire	5
Berkshire	5
Buckinghamshire	5
Caernarvonshire	1
Cambridgeshire	2
Cardiff	6
Cardiganshire	8
Carmarthenshire	9
Cheshire (Chester)	13
Cheshire (Knutsford)	19
Cornwall	6
Cumberland	6
Denbighshire (Ruthin)	2
Derbyshire	7
Devonshire	7
Dorset	7
Essex	28
Essex (Appeals)	8
Flintshire	8
Hereford	30
Hertfordshire (Hertford)	5
Hertfordshire (Hertford) (Appeals)	6
Huntingdonshire	6
Isle of Ely (Wisbech)	7
Isle of Wight	14

	January
Kent, East	5
Kent, West	12
Lincolnshire (Parts of Holland: Boston)	5
Lincolnshire (Parts of Kesteven: Bourne)	15
Lincolnshire (Lindsey)	27
Merioneth (Dolgellau)	6
Monmouthshire	7
Montgomeryshire (Welshpool)	1
Norfolk (King's Lynn)	14
Norfolk (Norwich)	7
Nottinghamshire (Nottingham)	5
Oxfordshire	6
Pembrokeshire	5
Peterborough, Soke of	8
Rutland	2
Somerset (Taunton)	7
Suffolk, West	6
Sussex, West	8
Warwickshire	6
Westmorland	2
Wiltshire (Devizes)	7
Winchester	2
Worcestershire	7
Yorkshire, West Riding	12

	February
Essex (Appeals)	10
Hertfordshire (Hertford)	24
Hertfordshire (St. Albans)	9
Hertfordshire (St. Albans) (Appeals)	10

	February
Kent, East	2
Kent, West	9
Nottinghamshire (East Retford)	16
Pembrokeshire	16
Sussex, West	26

BOROUGH QUARTER SESSIONS

	January		January
Birkenhead	5	Newark	21, 22
Bridgewater	23	Newcastle under Lyme	14
Bristol	5	Oldham	5
Canterbury	17	Plymouth	6
Croydon	9	Poole	5
Deal	9	Reading	28
Derby	14	Rochester	5
Dover	9	Rotherham	5
Folkestone	10	Salisbury	8
Grantham	12	Southend-on-Sea	5
Gravesend	8	Sunderland	21
Kingston upon Hull	5	Swansea	26
Maidstone	30	Wolverhampton	21
Margate	16		

	February		February
Andover	3	Croydon	27

the ultimate authority . . .

' . . . they (the editors) have produced a work on practice and procedure in magistrates' courts which is clear and informative and, to the modern practitioner as well as to his elder brethren, concise and readable. If the practitioner requires a work " replete with the inevitable authorities " the tenth edition of *Paley* amply fulfils that requirement.'—*The Law Society's Gazette*

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PALEY

on

SUMMARY CONVICTIONS

and the Magistrates' Courts Act, 1952

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Calendar

Winter Assizes, 1959

First Working Days

South Eastern Circuit (Jones and Finnemore JJ.)

February	*March*
3, 7: Norwich	3: Maidstone
10: Chelmsford	13: Lewes
24: Kingston	

Wales and Chester Circuit (Barry, Davies and Edmund Davies JJ.)

February	*March*
3: Mold	2: Haverfordwest
6: Chester	5: Carmarthen
20: Presteign	12: Cardiff
23: Brecon	
26: Lampeter	

Western Circuit (Cassels, Slade and Stevenson JJ.)

February	*March*
3: Bodmin	10: Winchester
10: Exeter	
24: Bristol	

Northern Circuit (Wallington, Pearson, Salmon and Elwes JJ.)

February	*March*
10: Liverpool	3: Manchester

Oxford Circuit (Hilbery and Stable JJ.)

February	*March*
3: Gloucester	3: Stafford
10: Newport	10: Birmingham
18: Hereford	
24: Shrewsbury	

Midland Circuit (Byrne, Collingwood and Havers JJ.)

February	*March*
3: Lincoln	3: Warwick
10: Derby	10: Birmingham
17: Nottingham	

North Eastern Circuit (Donovan, Glyn-Jones, Wrangham and Thesiger JJ.)

February	*March*
10: York	10: Leeds
24: Sheffield	

CENTRAL CRIMINAL COURT, 1959

First Working Days

February 17 March 10

COUNTY QUARTER SESSIONS

	February
Cambridge	20
Essex (Appeals)	10
Hertfordshire (Hertford)	24
Hertfordshire (St. Albans)	9
Hertfordshire (St. Albans) (Appeals)	10

	February
Kent, East	2
Kent, West	9
Lichfield	9
Nottinghamshire (East Retford)	16
Oxford	13
Pembrokeshire	16
Sussex, West	26

	March
Anglesey	17
Cumberland	24
Essex	4
Essex (Appeals)	17
Gloucestershire	18
Leicestershire	9
Lincolnshire (Lindsey)	5

	March
Norfolk (Norwich)	25
Northamptonshire	19
Warwickshire	24
Wiltshire (Salisbury)	25
Yorkshire, East Riding	17
Yorkshire, West Riding	9

BOROUGH QUARTER SESSIONS

	February
Andover	3
Banbury	17
Croydon	27
Devizes	27

	February
Dudley	19
Middlesbrough	4
Smethwick	11

	March
Abingdon	4
Bristol	23
Canterbury	21

	March
Rochester	23
Southampton	23
Southend-on-Sea	16

Calendar

WINTER ASSIZES, 1959

First Working Days

South Eastern Circuit (Jones and Finnemore JJ.)
March
3: Maidstone
13: Lewes

Wales and Chester Circuit (Barry, Davies and Edmund Davies JJ.)
March
2: Haverfordwest
5: Carmarthen
12: Cardiff

Western Circuit (Cassels, Slade and Stevenson JJ.)
March
10: Winchester

Northern Circuit (Wallington, Pearson, Salmon and Elwes JJ.)
March
3: Manchester

Oxford Circuit (Hilbery and Stable JJ.)
March
3: Stafford
10: Birmingham

Midland Circuit (Byrne, Collingwood and Havers JJ.)
March
3: Warwick
10: Birmingham

North Eastern Circuit
(Donovan, Glyn-Jones, Wrangham and Thesiger JJ.)
March
10: Leeds

CENTRAL CRIMINAL COURT, 1959

First Working Days

March 10 April 14

COUNTY QUARTER SESSIONS

	March
Anglesey	17
Cumberland	24
Essex	4
Essex (Appeals)	17
Gloucestershire	18
Leicestershire	9
Lincolnshire (Lindsey)	5

	March
Norfolk (Norwich)	25
Northamptonshire	19
Warwickshire	24
Wiltshire (Salisbury)	25
Yorkshire, East Riding	17
Yorkshire, West Riding	9

	April
Bedfordshire	6
Berkshire	6
Buckinghamshire	6
Caernarvonshire	2
Cambridgeshire	3
Cardiff	20
Cardiganshire	2
Carmarthenshire	10
Cheshire (Chester)	13
Cheshire (Knutsford)	7
Cornwall	7
Denbighshire (Denbigh)	3
Derbyshire	8
Devonshire	1
Dorset	1
Essex	8
Essex (Appeals)	21
Flintshire	2
Hampshire	1
Hereford	6
Hertfordshire (St. Albans)	6
Hertfordshire (St. Albans) (Appeals)	7
Huntingdonshire	7
Isle of Ely (Ely)	1

	April
Isle of Wight	8
Kent, East	6
Kent, West	13
Lincolnshire (Lindsey)	28
Lincolnshire (Parts of Holland: Spalding)	2
Lincolnshire (Parts of Kesteven: Sleaford)	9
Merioneth (Bala)	7
Monmouthshire	1
Montgomeryshire (Newtown)	2
Norfolk (King's Lynn)	8
Nottinghamshire (Nottingham)	6
Oxfordshire	7
Pembrokeshire	6
Peterborough, Soke of	9
Rutland	3
Shropshire	1
Somerset (Wells)	1
Suffolk, West	7
Sussex, West	9
Westmorland	3
Winchester	2
Worcestershire	8

BOROUGH QUARTER SESSIONS

	March
Abingdon	4
Bristol	23
Burton-upon-Trent	17
Canterbury	21
Kingston-upon-Hull	25
Plymouth	31

	March
Rochester	23
Shrewsbury	24
Southampton	23
Southend-on-Sea	16
West Bromwich	24

	April
Birkenhead	20
Bridgwater	24
Croydon	10
Deal	17
Dover	3
Folkestone	18
Grantham	13

	April
Gravesend	9
Maidstone	24
Margate	24
Newark	22, 23
Poole	13
Reading	15
Swansea	1

Calendar

AUTUMN ASSIZES, 1959

First Working Days

South Eastern Circuit (Streatfeild and Hinchcliffe JJ.)

October		*November*		*December*	
Hertford	6	Chelmsford	3	Lewes	8
Cambridge	13	Kingston	17		
Bury St. Edmunds	20	Maidstone	24		
Norwich	27				

Wales and Chester Circuit (Byrne, Karminski and Davies JJ.)

October		*November*	
Caernarvon	3	Brecon	7
Ruthin	13	Carmarthen	12
Chester	21	Cardiff	19

Western Circuit (Devlin, McNair and Marshall JJ.)

October		*November*		*December*	
Devizes	6	Exeter	3	Winchester	1
Dorchester	13	Bristol	17		
Taunton	20				
Bodmin	27				

Northern Circuit (Jones, Ashworth, Phillimore and Winn JJ.)

October		*November*	
Carlisle	6	Manchester	24
Lancaster	15		
Liverpool	27		

Oxford Circuit (Pilcher and Finnemore JJ.)

October		*November*		*December*	
Reading	2	Newport	3	Birmingham	1
Worcester	9	Hereford	11		
Oxford	20	Shrewsbury	17		
Gloucester	27	Stafford	24		

Midland Circuit (Stable, Glyn-Jones and Hewson JJ.)

October		*November*		*December*	
Aylesbury	2	Derby	3	Birmingham	1
Bedford	6	Nottingham	10		
Northampton	13	Warwick	24		
Leicester	20				
Lincoln	27				

North Eastern Circuit (Slade, Wrangham, Elwes, Thesiger JJ.)

October		*November*		*December*	
Newcastle	6	York	3	Leeds	1
Durham	20	Sheffield	17		

CALENDAR

CENTRAL CRIMINAL COURT

First Working Days

September 9 October 14

COUNTY QUARTER SESSIONS

	August		August
Essex (Appeals)	25	Pembrokeshire	17
Kent, East	24	Sussex, West	6
	September		September
Anglesey	29	Isle of Wight	16
Bedfordshire	28	Kent, West	7
Berkshire	28	Lincolnshire (Lindsey)	15
Buckinghamshire	28	Merioneth (Dolgellau)	22
Caernarvonshire	17	Montgomeryshire (Welshpool)	24
Cornwall	17	Norfolk (Norwich)	23
Cumberland	29	Northamptonshire	24
Devonshire	29	Rutland	29
Essex	2, 30	Shropshire	16
Essex (Appeals)	22	Somerset (Wells)	23
Flintshire	24	Suffolk, West	22
Gloucestershire	23	Sussex, West	24
Hampshire	21	Warwickshire	29
Hereford	4	Wiltshire (Marlborough)	30
Hertfordshire (St. Albans)	28	Winchester	24
Hertfordshire (St. Albans) (Appeals)	29	Worcestershire	28, 30
		Yorkshire, East Riding	22

BOROUGH QUARTER SESSIONS

	August		August
Cambridge	7	Maidstone	31
Cardiff	5	Sheffield	10
Deal	7		
	September		September
Abingdon	10	Lichfield	9
Banbury	8	Lincoln	30
Birkenhead	29	Poole	21
Blackburn	29	Rochester	21
Cardiff	21	Shrewsbury	8
Croydon	21	Southampton	28
Devizes	11	Southend-on-Sea	21
Dover	25	West Bromwich	29
Dudley	28		

Calendar

AUTUMN ASSIZES, 1959

First Working Days

South Eastern Circuit (Streatfeild and Hinchcliffe JJ.)

October		*November*		*December*	
Hertford	6	Chelmsford	3	Lewes	8
Cambridge	13	Kingston	17		
Bury St. Edmunds	20	Maidstone	24		
Norwich	27				

Wales and Chester Circuit (Byrne, Karminski and Davies JJ.)

October		*November*	
Caernarvon	3	Brecon	7
Ruthin	13	Carmarthen	12
Chester	21	Cardiff	19

Western Circuit (Devlin, McNair and Marshall JJ.)

October		*November*		*December*	
Devizes	6	Exeter	3	Winchester	1
Dorchester	13	Bristol	17		
Taunton	20				
Bodmin	27				

Northern Circuit (Jones, Ashworth, Phillimore and Winn JJ.)

October		*November*	
Carlisle	6	Manchester	24
Lancaster	15		
Liverpool	27		

Oxford Circuit (Pilcher and Finnemore JJ.)

October		*November*		*December*	
Reading	2	Newport	3	Birmingham	1
Worcester	9	Hereford	11		
Oxford	20	Shrewsbury	17		
Gloucester	27	Stafford	24		

Midland Circuit (Stable, Glyn-Jones and Hewson JJ.)

October		*November*		*December*	
Aylesbury	2	Derby	3	Birmingham	1
Bedford	6	Nottingham	10		
Northampton	13	Warwick	24		
Leicester	20				
Lincoln	27				

North Eastern Circuit (Slade, Wrangham, Elwes and Thesiger JJ.)

October		*November*		*December*	
Newcastle	6	York	3	Leeds	1
Durham	20	Sheffield	17		

Calendar

Central Criminal Court

First Working Days

September 9	October 14

County Quarter Sessions

	September		September
Anglesey	29	Isle of Wight	16
Bedfordshire	28	Lincolnshire (Lindsey)	15
Berkshire	28	Merioneth (Dolgellau)	22
Buckinghamshire	28	Montgomeryshire (Welshpool)	24
Caernarvonshire	17	Norfolk (Norwich)	23
Cornwall	17	Northamptonshire	24
Cumberland	29	Rutland	29
Devonshire	29	Shropshire	16
Essex	30	Somerset (Wells)	23
Essex (Appeals)	22	Suffolk, West	22
Flintshire	24	Sussex, West	24
Gloucestershire	23	Warwickshire	29
Hampshire	21	Wiltshire (Marlborough)	30
Hertfordshire (St. Albans)	28	Winchester	24
Hertfordshire (St. Albans) (Appeals)	29	Worcestershire	28, 30
		Yorkshire, East Riding	22

	October		October
Cambridgeshire	2	Leicestershire	12
Cardiganshire	1	Lincolnshire (Parts of Holland: Spalding)	8
Carmarthenshire	2	Lincolnshire (Parts of Kesteven: Sleaford)	15
Cheshire (Chester)	12	Lincolnshire (Lindsey)	15
Cheshire (Knutsford)	6	Monmouthshire	7
Denbighshire (Wrexham)	2	Norfolk (King's Lynn)	7
Derbyshire	7	Nottinghamshire (Nottingham)	5
Dorset	7	Oxfordshire	6
Essex	28	Pembrokeshire	5
Essex (Appeals)	20	Peterborough, Soke of	8
Hereford	5	Westmorland	2
Huntingdonshire	6	Yorkshire, West Riding	12
Isle of Ely (Ely)	7		
Kent, East	5		
Kent, West	19		

Borough Quarter Sessions

	September		September
Birkenhead	29	Lincoln	30
Blackburn	29	Oldham	22
Bradford	21	Poole	21
Burnley	24	Rochester	21
Burton-upon-Trent	17	Sheffield	30
Cardiff	21	Southampton	28
Croydon	21	Southend-on-Sea	21
Dover	25	West Bromwich	29
Dudley	28	Worcester	25

CALENDAR

	October		October
Andover	27	Grantham	12
Bridgwater	23	Gravesend	1
Bristol	5	Margate	9
Canterbury	10	Newark	22, 23
Croydon	15	Plymouth	6
Folkestone	10	Reading	14

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Calendar

AUTUMN ASSIZES, 1959

First Working Days

South Eastern Circuit (Streatfeild and Hinchcliffe JJ.)

November		*December*	
Chelmsford	3	Lewes	8
Kingston	17		
Maidstone	24		

Wales and Chester Circuit (Byrne, Karminski and Davies JJ.)

November	
Brecon	7
Carmarthen	12
Cardiff	19

Western Circuit (Devlin, McNair and Marshall JJ.)

November		*December*	
Exeter	3	Winchester	1
Bristol	17		

Northern Circuit (Jones, Ashworth, Phillimore and Winn JJ.)

November	
Manchester	24

Oxford Circuit (Pilcher and Finnemore JJ.)

November		*December*	
Newport	3	Birmingham	1
Hereford	11		
Shrewsbury	17		
Stafford	24		

Midland Circuit (Stable, Glyn-Jones and Hewson JJ.)

November		*December*	
Derby	3	Birmingham	1
Nottingham	10		
Warwick	24		

North Eastern Circuit (Slade, Wrangham, Elwes and Thesiger JJ.)

November		*December*	
York	3	Leeds	1
Sheffield	17		

CALENDAR

CENTRAL CRIMINAL COURT

First Working Day

November 17

COUNTY QUARTER SESSIONS

	November		November
Cambridge	20	Kent, East	9
Essex (Appeals)	24	Nottinghamshire (Newark)	5
Hereford	20	Pembrokeshire	16
Hertfordshire (Hertford)	16, 24	Sussex, West	5
Hertfordshire (Hertford) (Appeals)	17		

	December		December
Anglesey	15	Kent, West	7
Essex	2	Shropshire	30
Essex (Appeals)	22	Yorkshire, East Riding	15
Gloucestershire	15, 16		

BOROUGH QUARTER SESSIONS

	November		November
Croydon	26	Oxford	4
Deal	20	Southend-on-Sea	9
Devizes	27	Swansea	4
Maidstone	9	Wigan	12

	December		December
Abingdon	2	Dudley	17
Banbury	1	Shrewsbury	15

Calendar

AUTUMN ASSIZES, 1959

First Working Days

South Eastern Circuit (Streatfeild and Hinchcliffe JJ.)

	December
Lewes	8

Western Circuit (Devlin, McNair and Marshall JJ.)

	December
Winchester	1

Oxford Circuit (Pilcher and Finnemore JJ.)

	December
Birmingham	1

Midland Circuit (Stable, Glyn-Jones and Hewson JJ.)

	December
Birmingham	1

North Eastern Circuit (Slade, Wrangham, Elwes and Thesiger JJ.)

	December
Leeds	1

CENTRAL CRIMINAL COURT

First Working Day
December 1

COUNTY QUARTER SESSIONS

	December		December
Anglesey	15	Lincolnshire (Lindsey)	8
Caernarvonshire	31	Kent (West)	7
Essex	2	Northamptonshire	10
Essex (Appeals)	22	Shropshire	30
Gloucestershire	15, 16	Worcestershire	22
Leicestershire	15	Yorkshire, East Riding	15

BOROUGH QUARTER SESSIONS

	December		December
Abingdon	2	Lincoln	30
Banbury	1	Shrewsbury	15
Dudley	17	West Bromwich	30
Hastings	2		

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